No. 3426

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IN ADMIRALTY

HIND, ROLPH & COMPANY, a Copartnership, and 1,727,783 Feet of Lumber Loaded on Board the Schooner "Levi W. Ostrander," and Fidelity Deposit Company of Maryland, a Corporation,

Appellants and Cross-Appellees,

vs.

H. F. OSTRANDER,

Appellee and Cross-Appellant.

Upon Appeal From the United States District Court for the Western District of Washington, Northern Division.

ANSWERING BRIEF OF H. F. OSTRANDER, APPELLEE AND CROSS-APPELLANT

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The ultimate question for solution involved in this particular appeal is whether Judge Neterer was right in awarding Mr. Ostrander demurrage for the

period from the 15th of October to December 14, 1917, less fourteen (14) days exclusive of Sundays. We have discussed in another brief the claim of Mr. Ostrander for demurrage for the period from August 25th to October 14th. There is, however, one contention made by the charterers in this case which they will claim applicable to the whole period. As early as August 16, 1917, Hind, Rolph & Company asserted that the *strike clause* in the charter party exonerated them from any liability for demurrage, and that position has been maintained by them ever since. In fact, no other reason for denying liability for demurrage was ever assigned until the filing of the answer. Even if the charterers' construction of the strike clause is correct, yet we think it clear that the provisions of that clause cannot avail them as far as the delay subsequent to October 14th is concerned, and logically therefore the question should be dealt with in the reply brief in the other appeal. But for the sake of convenience we deal with it here. Again, we believe that we can best aid the court by dealing chronologically with the questions involved in this appeal. So doing will require that we depart somewhat from the order in which such questions are considered in appellant's brief.

We summarize, first, that which happened prior to October 14th. The charter party was executed on May 15, 1917. It provided *inter alia* that lay day *should not commence before July 1, 1917,* "unless at charterers' option," and that if vessel did not arrive at port of loading on or before twelve o'clock noon of the 31st day of August, 1917, charterers had the option of cancelling or maintaining the charter on the arrival of vessel. (14.)*

Shortly after the execution of the charter party Hind, Rolph & Company requested advice as to date when vessel would be ready to load. On August 13th, they were advised that the schooner would be ready for cargo on August 25th. This notice was accepted, but no direct, unqualified order to go to the loading port was given to the schooner until October 12th. Notice having been then given, the schooner took a tug and arrived at Port Angeles on the morning of October 14th.

FROM OCTOBER 14TH TO OCTOBER 17TH THE DEMURRAGE RELEASE.

Upon the arrival of the schooner at Port Angeles her Master delivered to the Puget Sound Mills & Timber Company (hereinafter called the Mill Company) the following letter:

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* (Numbers in parenthesis refer to pages of Apostles.)

"Puget Sound Mills & Timber Co.,
As representing,
Messrs. Hind, Rolph & Co., San Francisco,
Charterers of Schooner 'Levi W. Ostrander'
Port Angeles, Washington.

Dear Sirs:-

"This is to advise you that in accordance with telegraphic instructions from Messrs. Hind, Rolph & Co. of San Francisco, received by my owner at Seattle, October 12th, requesting that my vessel be ordered here, I now hand you Surveyor's report and would advise that I am ready to receive cargo.

"Further, my vessel having been at all times, since August 25th, ready to receive cargo and due notice of such readiness having been given to Messrs. Hind, Rolph & Co., please note that demurrage will be claimed for all time during which charterers have failed to furnish cargo, in accordance with Charter Party of May 15, 1917.

Yours very truly,

Master — Schooner 'L. W. Ostrander'

Sgd — Carl F A Henningsen.

Port Angeles, Wash.
October 14, 1917."
(Respondents' A-2.)

It is true that the Captain says that this note was delivered on the 15th (54), but he must be in error in that regard, as the notice is dated October 14th and the Mill Company on that date wired Charles Nelson Company at San Francisco, as follows:

"Port Angeles, Oct. 14, 1917.
To The Charles Nelson Co.,
San Francisco, Calif.

"Ostrander here this morning Captain serves notice lay day commencing August 25th. We refused to accept notice also refused to give vessel any lumber. We have about 250 thousand on dock. Advise as soon as possible what we are to do.

Puget Sound Mills & Timber Co."
(Respondents' A-17.)

The Charles Nelson Company replied on October 15th as follows:

"San Francisco, Oct. 15, 1917,
Phoned to C. F.—3/20 P M
To Puget Sound Mills & Timber Co.
Port Angeles, Wn.

"Ostrander. Under no condition consider lay days as commencing August 25th or any date prior to arrival of vessel at the loading port and reported ready for cargo. Advise captain account strike conditions you are *short of logs* suitable for this cargo and that you are doing the best you can and will agree to proceed with cargo as rapidly as possible with specific understanding that no demurrage will be claimed when loading completed.

Charles Nelson Company."
(Respondents' A-16.)

We digress at this point to consider a matter not pertinent to the immediate question under consideration. It is claimed over and over again in appellants' brief that the Mill Company throughout

the entire transaction acted with due diligence and with fairness to the shipowner. It will be noted, however, from the two preceding telegrams that the Mill Company would not act until it received instructions from San Francisco. The Charles Nelson Company directs the Mill Company to give to the Master of the "Ostrander" a reason why cargo cannot be furnished as required by the charter party. The Nelson Company tells the Mill Company to inform the Captain that the Mill Company is *short* of *logs.* Was that statement true? All the evidence in the record unmistakably points to the conclusion that the statement was untrue. From the report demanded by us from the Mill Company (Libelant's ——), it appears that on June 30th the Mill Company had in its pond at Port Angeles 1,742,000 feet of No. 2 fir logs; on July 1st it had 2,016,000 feet; on August 31st, 1,994,710 feet; on September 30th, 2,044,600 feet; on October 31st, 1,848,030 feet; on November 30th, 2,262,860 feet. If, therefore, the advice which Charles Nelson Company directed the Mill Company to give to the Captain was true, it would have been impossible for the Mill Company to have provided the cargo for the "Ostrander" even in the month of June, *weeks before the strike took place,* because on June 30th the Mill Company had a lesser number of feet of

logs in its pond than at any time during the succeeding five months. Moreover, it will be remembered that on October 12, 1917, (Libelant's 1-E[1]), Hind, Rolph & Company gave as one of the reasons for sending the "Ostrander" to Port Angeles that the Mill Company had a *good supply* of *logs* on hand. It certainly would seem reasonable that Hind, Rolph & Company obtained this information from Charles Nelson Company.

Returning, now, to that which happened from October 14th to October 17th, the evidence discloses that the Mill Company, duly obedient to its advice from San Francisco, delivered to the Captain of the "Ostrander" the following letter:

> "We are herewith returning you your notice for readiness to receive cargo, as we cannot accept this notice.
>
> "The notice states, lay days will commence from August 25th. You cannot expect us to accept such a notice when you did not arrive at our dock until October 14, 1917. Further, we will *not* accept *any notice at any time* in regard to the commencement of lay days. We wish to advise you that we have had a strike at our plant which stopped operations in our saw mill and logging camps for about two months and we have not up to the present time been able to resume operations to full capacity the same as before the strike.
>
> "Should you, however, wish to commence loading, you may do so providing you waive all

claim for demurrage. We agree to furnish you lumber as fast as we possibly can." (Respondents' A-4.)

Mr. Ostrander on the same day wired Hind, Rolph & Company as follows:

"Puget Sound Mills and Timber Company have notified master of Ostrander now at their mill Port Angeles that they will furnish no cargo to vessel unless all claims for demurrage are waived and also that they will not accept any notice at any time of commencement of lay days. They returned to the master his notice that he was ready to receive cargo STOP Were they acting under instructions from you in so doing STOP Do you take the position assumed by them STOP Unless cargo furnished without further delay I will consider you have abandoned charter and I will employ vessel in other service and will hold you for demurrage to date and also for all other losses I may sustain." (Libelant's Exhibit 3-A.)

Hind, Rolph & Company, knowing that the position taken by the Charles Nelson Company and the Mill Company was wrong, sent the following telegram on October 15th:

"Puget Sound Mills and Timber Company were not acting under instructions from us. We have *interviewed* their representative and are assured that you misunderstand their position. Mill has part of cargo ready and will deliver this to master for loading at once; also will deliver balance as fast as strike conditions permit; but mill will refuse to recognize your claim for demurrage on account of conditions resulting from strike. We wish it

> distinctly understood that we are not abandoning charter and that we deny liability for demurrage and losses mentioned in your wire." (Libelant's 3-B.)

This telegram was received by Mr. Ostrander on October 16, 1917, at about 8:30 A. M. It will be noted that Hind, Rolph & Company say in the telegram just set out that Mr. Ostrander misunderstands the position of the mill. But in view of the telegrams passing between the Mill Company and the Nelson Company we think it clear that Mr. Ostrander did not misunderstand the Mill Company's position.

The Charles Nelson Company, after the interview mentioned in the preceding telegram, wired the Mill Company as follows:

> "Ostrander. Give captain letter stating he may commence loading now and you will furnish cargo as rapidly as possible under existing conditions, but when he has *completed loading* you will *dispute* any claim he may make for demurrage. This supersedes our wire date." (Respondents' A-15.)

Obedient to this wire, the Mill Company delivered a letter to the Master of the "Ostrander," in which the Mill Company said:

> "It is agreeable with us you commence loading now or any time your vessel is ready to receive cargo, and we will furnish the cargo

just as rapidly as possible under existing conditions. We will, however, on the *completion* of the loading of your vessel, *insist upon a demurrage release* and will dispute any claim you make for demurrage." (Respondents' A-5.)

The Captain then replied as follows:

"Port Angeles, Octbr. 16th, 1917.
The Puget Sound Mills & Timber Co.,
Port Angeles, Wash.
Gentlemen:

"In answer to your letter of even date, I wish to state that I have orders from the owners in Seattle to await instructions from them before commencing to load." (Respondents' A-6.)

At 2:22 P. M. on October 16th Mr. Ostrander relying on the message from Hind, Rolph & Co. (Libelant's 3-B), sent this telegram to his Captain:

"Please notify the Mill Company that you will now receive cargo as offered but without prejudice to any claim for demurrage we may have against Hind, Rolph & Company as charterers, should the mill now be willing to deliver cargo on this basis. Please agree daily with the mill as to amount delivered to you each day and the amount you could reasonably have expected to load. This that the daily shortage may be thoroughly established. Wire answer." (Libelant's 10-A.)

And at 6:05 P. M. on the same day he wired the Master as follows:

"Further to my wire this date, if notice not already given deliver to mill as requested, also

> acknowledge receipt of their letter of date and in reply point out that the charter being with Hind, Rolph & Co. and not with the mill company *we will look to the former for demurrage* and therefore cannot discuss the question of demurrage with the mill as principal." (Respondents' A-8.)

The Master, some time on the following day, delivered to the Mill Company the following letter:

P. S. M. & T. Co.
Received
Oct. 17, 1917

> "This is to notify you that the Schr. Levi W. Ostrander will be ready to receive cargo today at 1 p. m. I also agree under existing conditions to sign a demurrage release to your mill upon completion of cargo." (Respondents' A-7.)

That this letter was received on October 17th is made manifest by the stamp placed thereon.

The mere reading of this correspondence will demonstrate that immediately upon the Captain's presenting his notice of readiness to load cargo, the Mill Company sought advice from Charles Nelson Company; that Charles Nelson Company directed the Mill Company to refuse the notice, and that the Mill Company complied with this order; that as soon as Mr. Ostrander was informed thereof he wired Hind, Rolph & Company; that Hind, Rolph & Company did not claim that the Master should

sign a demurrage release before he commenced to load his vessel; that apparently they so advised Charles Nelson Company; that thereupon the Nelson Company so advised the Mill Company, and that as soon as Mr. Ostrander was informed that a condition which the Mill Company did not have a right to exact was no longer being insisted upon, he directed the Master of the Schooner to accept the cargo. The delay, therefore, was attributable solely to the refusal of the Mill Company to furnish cargo unless an illegal exaction was complied with.

It is said, however, that the Captain did agree on October 17th to sign a demurrage release, and that Mr. Ostrander did not repudiate his action in that regard. We think the evidence makes clear the manner in which this agreement for a demurrage release was obtained. The telegram sent by Mr. Ostrander to his Master at 2:22 P. M. on October 16th (Libelant's 10-A) was telephoned by the Telegraph Company to the Mill Company, and by the Mill Company delivered to the Captain (305). Moreover, the telegram sent at 6:05 P. M. on October 16th by Mr. Ostrander to his Captain was also apparently telephoned by the Telegraph Company to the Mill Company, and by the Mill Company de-

livered to the Captain, for it had thereon the following stamp:

"P. S. M. & T. CO.
RECEIVED
OCT. 17, 1917"

The *Mill Company* therefore *knew* the contents of both of these telegrams *before* they were known to the Master.

We believe that no one can escape the conclusion that the Mill Company, having read the telegram sent at 6:05 P. M. October 16th (Respondents' A-8) by Mr. Ostrander to his Captain, induced the Captain to give to it the letter in which the Captain agrees to sign a demurrage release. That the Captain misinterpreted the telegram sent by Mr. Ostrander at 6:05, and was thereby the more readily induced by the argument of the representative of the Mill Company to sign the letter, is clearly apparent from the letter sent by him to Mr. Ostrander on the same day (Respondents' B). It is obvious, of course, that there was no instruction in the telegram sent at 6:05 on October 16th by Mr. Ostrander which would warrant the Captain in agreeing to give to the Mill Company a demurrage release.

It is equally obvious that the claim now made by the charterers that Mr. Ostrander never repudiated the action of his Captain is without merit. We say

this because the evidence discloses that Mr. Ostrander having received Captain Henningsen's letter wired him at 10:25 A. M. on October 18th as follows:

> "Hind, Rolph & Company having agreed to pay the ten per cent and labor demanded by the mill it is now in order to begin loading. However, before loading, I want you to reach a definite agreement with the mill that, having no contract with the mill as principals, the question of demurrage cannot be discussed between us; that our claim is clearly against Hind, Rolph and we do not know or do not care what agreement Hind, Rolph & Company have with the mill. Therefore it is not in order for the mill to ask you to sign a demurrage release; that if acquired must be obtained from Hind, Rolph. I make this request as I fear your notice mentioned in your letter 17th may possibly embarrass us in our claim against Hind, Rolph." (Libelant's 10-B.)

This telegram was also telephoned by the Telegraph Company to the mill. It was then written out on a typewriter by the mill and delivered to the Captain (306). The Mill Company therefore *knew on October 18th* that Mr. Ostrander had *repudiated* the action of the Captain. Furthermore, Mr. Ostrander testified that at the time he was at the Port Angeles mill in October, 1917, he had a conversation with Mr. Scott, the Manager of the Mill Company, in which he asked Mr. Scott for the letter signed by Captain Henningsen on October 17th. Mr. Scott

showed Mr. Ostrander the letter, and Mr. Ostrander thereupon told him that, without regard to the letter, he would still, as he always had, insist upon demurrage being paid. (379, 380.) Mr. Scott at the time of the trial would not deny that such a conversation took place. (230.) Mr. Ostrander also testified that he did not know that the Captain had signed the letter of October 17th until he received, on the morning of the 18th of October, the letter hereinbefore set out. (Respondents' B.)

The allegation of the answer, therefore, that the Captain was in this regard "acting with full authority from the libelant," is wholly disproven by the evidence, and the assertion now made in the brief (Appellants' Brief, p. 37) that Mr. Ostrander did not repudiate what the Captain had done is also disproven by the evidence. Unless Mr. Ostrander ratified the action of the Captain in agreeing to give a demurrage release, the action of the Captain was wholly null and void.

In *Holman v. Peruvian Nitrate Co.,* 5 Sc. Sess. C., 4th Ser. p. 657, it appears that the Peruvian Nitrate Company in 1874 chartered the barque "Constantine" belonging to John Holman & Sons, shipowners, London, to proceed from Leith with a cargo of coals for the port of Iquique in Peru, and after unloading to take on there a cargo of nitrate of soda

to be discharged in a port in the United Kingdom. There was a charter party for the outward and one for the homeward voyage. After the "Constantine" had unloaded the cargo of coal at Iquique, she proceeded to take on the homeward cargo. Iquique is an open roadstead, and the cargo had to be delivered alongside the ship from lighters. Owing to the condition of the surf, it was impossible, on divers days, to deliver any cargo to the boat. The Court held that the charterer was not exonerated by reason of its inability to deliver the cargo within time. The captain, however, had delivered to the agent of the Peruvian Nitrate Company at Iquique the following documents:

> "Received from the Peruvian Nitrate Company, Ltd., the sum of 46 soles, in full of demurrage in the loading of homeward cargo of nitrate of soda under charter party dated 8th September, 1874."

The Court after pointing out that the Captain insisted that the receipt covered only one day's demurrage, said:

> "But apart from that question, I am of opinion that the captain had no power to grant any such discharge. I have already referred to the powers of a shipmaster as agent of his owners in a foreign port. *It may often be that a claim for demurrage may be as large, or almost as large, as the claim for freight itself.* If a vessel be detained waiting for a cargo there

may arise very large claims indeed. These are claims stipulated for in the charter-party as between the shipowner and the charterer. *The right to payment arises to the shipowner, and I do not think the captain in a foreign port has power in ordinary circumstances to discharge that right. Such a power is not necessary in the ordinary use of the ship or performance of the voyage, and it would be a serious matter for shipowners if a captain in a foreign port should be entitled to discharge a large claim of demurrage for a comparatively small sum.* The demurrage in this case was to be paid *daily,* and that shews that the captain had power to receive and discharge the demurrage actually paid. I think he had not authority, however, to grant a discharge binding *his owners for demurrage that he never received.*"

It will be remembered that the charter party here involved also provides for the payment of demurrage *day* by *day* or *daily.*

Now if a captain does not have the power to waive a demurrage claim in a port some 7,000 or 8,000 miles away from the residence of his owners, much less does he have the power when his owner is only a few miles away and when his owner can be communicated with hourly.

Furthermore, what was the consideration for the Captain's agreement? Neither the Mill Company nor Hind, Rolph & Company paid him a single

dollar. In the seventh affirmative defense in the answer a consideration is attempted to be pleaded in the following manner:

> "That had libelant not specifically recognized said conditions affecting the *furnishing* and loading of said cargo, and had he not specifically agreed in consequence thereof to waive all claims for damages, and to release claimants and said cargo from all claims for demurrage, the loading of said cargo would not have been commenced until a *later* time when said conditions had changed and become *normal.*"

In the first place, it is to be observed that there is not a scintilla of evidence in the case tending to establish any of the foregoing allegations. It follows, therefore, that even if the facts alleged constitute a consideration, nevertheless, no consideration has been proven. But the facts alleged do *not* constitute a consideration. It is not pretended that there was at any time in the summer of 1917 a strike of men engaged in the *actual loading* of ships; and, as we shall subsequently show, the exception clause in the charter party refers to a strike of such men only. The strike, therefore, if there was any, affected the furnishing of the cargo only, and the exception clause in the charter party does not cover such a strike. The charterers, consequently, were bound to furnish the cargo. How, then, can it be said that a consideration was given the Captain by

the doing of that which the charterers were bound absolutely to do? Again, even if we assume for the sake of the argument, that the exception clause covers the furnishing of the cargo as well as the actual loading of the vessel, still the position of the appellants is not improved. There was *no strike* at the mill or in the logging camp on *October 15, 1917.* The mill resumed work on *September 6th,* five weeks before; and the confidential report made to the West Coast Lumbermen's Association shows that in the week ending *September 22, 1917,* "the sawmill, box plant, planer and shingle mill were all running to *full capacity,*" and that the men were working 10 hours a day. (Libelant's 11.) If it be the law, as alleged in this affirmative defense, that no cargo need to have been furnished the "Ostrander" until conditions changed and became normal once more, then, according to the testimony of Mr. Scott, the cargo need not have been furnished *even down to the day of trial,* for he testified that "we never got back to the normal capacity of the mill," and that the mill was not 100 per cent efficient at the time of the trial. (204.)

It seems to us, therefore, indisputable that there was no consideration for the Captain's agreement. If so, no distinction can be made between the facts

in this case and the facts in the case of *Durchman v. Dunn,* decided by Judge Brown, and reported in 101 Fed. 606, affirmed 106 Fed. 950.

Viewed from any angle, therefore, we are unable to see why the libelant is not entitled to demurrage for the 15th, 16th and part of the 17th of October. The schooner was at Port Angeles. The strike was over. The delay was solely attributable to the mill, which was, in this instance at least, the agent of the appellants.

AFTERNOON OF OCTOBER 17TH AND OCTOBER 18TH—THE STEVEDORE DISPUTE.

On pages 10 and 11 of Appellant's Brief it is argued that after the dispute concerning the demurrage release was over, the Master of the vessel, though the mill was ready to furnish cargo, refused to receive it because of an order to that effect received by him from Mr. Ostrander, and the following phrase in the letter written on October 18th by the Master to Mr. Ostrander is relied upon to support this contention:

> "Mr. Ryan informed me later that *he had orders from you not to start loading* until further orders, so we are *therefore* at a standstill yet." (Respondents' B.)

The reason for the giving of such an order by Mr. Ostrander arose from *"high-handed and unjust procedure"* on the part of the Mill Company.

The charter party provided that "the stevedore, if any, to be employed by the vessel." (13.) No question has been made but that the vessel was able to employ its own stevedores. The Mill Company, however, had in its employ a number of stevedores. Mr. Robinson, the Assistant Manager of the Port Angeles Mill, told Mr. Ryan, the representative of Mr. Ostrander, that these stevedores had charge accounts at the Mill Company's store, and that the only way that the Mill Company had to get its money out of these men was to give them employment. (173.) More than that, the Mill Company demanded that the Master pay it ten per cent *more* than the wages of the stevedores.

About nine o'clock on the morning of October 17th Mr. Ostrander wired Hind, Rolph & Company as follows:

> "Re schooner Ostrander. The mill only this morning indicated readiness to deliver cargo and then gave notice that outside labor would not be permitted to work the vessel at its dock and that a charge of ten per cent on the payroll would be exacted by the mill for its men employed by the Master. There is nothing whatever in our charter warranting such action and

> I refuse absolutely to pay such charge. You will either have to agree to absorb it or furnish us cargo where we may load it with such men as we see fit." (Libelant's 3-C.)

This telegram was not received by Hind, Rolph & Company until late in the afternoon of October 17th. (Libelant's 3-E.)

Apparently before the receipt of Mr. Ostrander's telegram by Hind, Rolph & Company, Mr. Scott of the Mill Company advised Charles Nelson Company by wire (Respondents' A-9) that the Master would not employ the Mill Company's stevedores nor pay the ten per cent. Charles Nelson & Company replied as follows:

> "Ostrander. The position you are taking is absolutely correct. Stand pat." (Respondents' A-14.)

Hind, Rolph & Company upon the receipt of the telegram from Mr. Ostrander took the matter up with Charles Nelson & Company (Libelant's 3-E) and thereafter wired Mr. Ostrander as follows:

> "We agree with you that position taken by mill regarding stevedoring is *very unjust and high-handed procedure.* However, are particularly anxious avoid further delays or difficulties of whatsoever nature and will agree to pay this ten per cent ourselves if it is necessary for you to arrange on this basis." (Libelant's 3-D.)

The Charles Nelson Company itself subsequently acknowledged that it was in the wrong, for it wired the Mill Company as follows:

> "Ostrander. *Stand taken by Captain legally correct.* Proceed to give vessel cargo. Send us copy of notice served on you by Captain advising lay days commencing August 25th." (Respondents' A-13.)

The occasion, therefore, for the issuance of the order by Mr. Ostrander to his Captain not to commence loading was due to the illegal exaction made by the Mill Company. It is true that it was alleged in a separate affirmative defense in the answer in this case that the delay in loading was caused by the failure of Mr. Ostrander to secure stevedores. It is admitted now, however, by all parties, that the delay was caused solely by a very high-handed and unjust act on the part of the Mill Company, and that the Mill Company was in this regard the agent of the appellants herein. The responsibility for this delay, therefore, is upon Hind, Rolph & Company and the appellee is entitled to demurrage by reason of such delay.

THE SURVEYOR'S REPORT.

It is argued (Appellants' Brief, page 11 *et seq.*) that the lay days of the vessel did not commence until October 18th, because no surveyor's report was

tendered to the Mill Company until October 14th, and that the report then tendered was not a sufficient report. The facts concerning this matter are: On August 25th the schooner was ready to receive her cargo and was ready for her contemplated voyage, except for the bending on of some sails. Captain Gibbs testified that he would have issued a surveyor's report on that date, stating that the vessel was ready for her voyage, if he was given assurance that the sails would be placed in position. He did not issue a report on that date, however, for the reason that Mr. Ostrander did not ask for a report on that date. There was no reason, of course, why Mr. Ostrander should make such a request on August 25th. It is true it is said that a surveyor's report is necessary in order for the charterer to insure the cargo, *but the charterers had no cargo to insure on August 25th.* Even on the morning of October 15th they had only about 200,000 feet of lumber on the dock at Port Angeles. What benefit, therefore, would they have derived from having in their possession on August 25th, or even on October 14th, a surveyor's report? How were they damaged by its not being delivered to them at an earlier date? If they had had any need of a surveyor's report it could and would have been furnished to them as early as August 25th. (390-

394.) However, as soon as there was any necessity for the surveyor's report, Mr. Ostrander secured it. He gave it to the Captain, and the Captain on October 14th, as soon as he arrived at the mill, delivered it to the mill. (Respondents' A-2.) True, Mr. Hodges of Hind, Rolph & Company testified that he did not receive this surveyor's report until some time in December (274) when he received it from the Douglas Fir Exploitation & Export Company. The fact that it was not received by Mr. Hodges until December is, of course, immaterial because the Mill Company was the agent of Hind, Rolph & Company. The fact, however, that the report was not delivered to Hind, Rolph & Company until some time in December, and no demand apparently was ever made by them on the mill for the document prior to that time, demonstrates that Hind, Rolph & Company did not have much need of the surveyor's report at all.

It is argued, however, that the surveyor's report was insufficient in that it does not show that the vessel was, on October 15th, ready to receive her cargo or in proper condition for the voyage. The basis for this contention is that the vessel had not been examined by the surveyor on October 15th. The only question which the charterers could possibly raise in this case, however, is not whether the

boat was examined on October 15th, but whether a report dated on that date was delivered to the charterers or their agents. *The report is dated in October* and it shows that the vessel was suitable for the voyage. It recites that *the boat was well-built* and was in the opinion of the surveyor *"suitable to load a cargo of lumber for South Africa."* (50.)

It is true that some time apparently in the month of September, the wildcat of the windlass on the schooner broke. That fact, of course, does not show that the vessel was not seaworthy either on August 25th or on October 14th. The windlass in question had been tested out and found to be perfect. Thereafter, for some inexplicable cause, it broke. (159, 162, 394.) It is a matter of common knowledge that cast iron will contain blow holes and that the utmost vigilance cannot detect their presence. We think the lower court was perfectly right in forbidding any further inquiry into this matter. (160.)

The record does disclose that the vessel was actually seaworthy at Port Angeles; that she was surveyed by a surveyor of the San Francisco Board of Underwriters; that the surveyor issued a surveyor's report on October 13th, and that he would have issued a like report on August 25th, or at

any time thereafter; that this report was delivered to the charterers or their agents; that if one of the reasons for demanding a surveyor's report is to enable the charterer to insure a cargo such reason did not exist in this case, for the appellants had no cargo to insure.

Moreover, even if the surveyor's report had never been procured or delivered, such fact or facts would constitute no defense in this case, for Hind, Rolph & Company clearly waived compliance with this condition of the charter party.

In the case of *Wencke v. Vaughan,* 60 Fed. 448, it appears that a master of a chartered vessel gave notice that his vessel was ready for cargo, but failed to serve a surveyor's certificate as required by the charter party. The charterers made no complaint on this or any other ground, but stated that they *were not ready to furnish a cargo.* The Court of Appeals for the Fifth Circuit said:

> "The District Judge correctly held: 'By receiving the within notice without the certificate, and, when subsequently questioned by the master as to cargo, remaining silent about the absent certificate, the respondent must be considered to have waived that condition.' "

The Court of Appeals further approved the following statement of the District Judge:

> "Where time is running against the party, and the notice of defect is so *easily* given of a document which might be easily supplied if the party receiving the notice *wishes to rely* on the *omission,* he must, in fairness, be required to *signify* it to the other party."

Again, it is said (Appellants' Brief, p. 13) that lay days should not commence before October 18th, for the reason that the charterers had a right to cancel the charter party until the surveyor's report was tendered. The surveyor's report, however, was tendered on October 14th, and even if it had not been tendered at that time or delivered the charterers would not be excused for delay in furnishing the cargo, because, as we have just shown, they clearly waived compliance with such provision of the charter party.

FROM OCTOBER 18TH TO NOVEMBER 24TH

The schooner commenced loading at one o'clock on the afternoon of October 18th and completed same on the evening of November 24th. The operation therefore consumed 37½ days. The lower court found that "the vessel could readily have been loaded in 14 days." (445.) Her failure to load in 14 days was due to the fact that the charterer did not comply with the following provision of the charter party:

"T. Cargo to be delivered to vessel at loading port as fast as vessel can receive it."

Hind, Rolph & Company now claim that they are excused for the breach of this provision of the charter party because of a strike which prevented the furnishing of a cargo. That proposition we now consider. As we have stated elsewhere in this brief, however, consideration of this topic applies to the period before the vessel arrived at Port Angeles as well as the period thereafter.

THE PRIMARY DUTY OF THE CHARTERER IS TO HAVE A CARGO IN EXISTENCE.

The rule, as we understand it, is that it is the duty of the charterer to supply, provide or furnish a cargo and have it at the prescribed place and ready for the ship when the ship is ready for it. This rule is as old as the maritime law itself.

Ashburner's Rhodian Sea Law (Oxford University Press 1909) page CLXXXVII.

This duty of the charterer may be and usually is modified by exceptions in the charter party, but these exceptions, unless the contrary intention is *clearly expressed,* apply to *actual loading only.* "A court will not lightly infer that the shipowner has agreed to relieve the charterer from liability for

delays which he (the owner) *has no possible means of preventing or lessening.*" *Dampskibsselskabet Danmark v. Paulsen & Co.* (1913) Sess. Cas. 1043.

That the primary rule is as we have stated is easily susceptible of proof.

> "In performing his duty the first step which the charterer must take is *to procure* a cargo. The cargo must correspond with the description of the cargo in the charter party, and must be of the stipulated quantity. The charterer is, as a general rule, responsible for a failure to procure a cargo in due time, or at all. *Even the impossibility* of *procuring* a cargo does *not* excuse him. *The stipulated cargo may not exist;* it may be *impossible* in the existing state of things to obtain it; its exportation may be restricted or prohibited by the Government of the place whence it is to be procured. Nevertheless, in all these cases the charterer is responsible for his failure, whether *total* or *partial,* to procure it, unless the whole transaction is vitiated by illegality."
>
> Halsbury's Laws of England, Vol. 26, § 284.

In *McLeod v. 1600 Tons of Nitrate of Soda,* 55 Fed. 528, 61 Fed. 849, the charterer was unable to furnish a cargo because a civil war then raging in Chili made it impossible for him to procure it. This Court said:

> "There was no unusual or extraordinary interruption in the *loading* of the Dunstaffnaage. There was no interruption or interference therewith at all. There was no interposition of force

> between the cargo and the vessel. There was no closing of docks or seizure of property. The difficulty was of an entirely different nature. It arose from the fact that the charterers *had no cargo to load.* In entering into the charter party, the shipowner placed his vessel at the *disposal* of the charterers for the stipulated time and voyage. *He had the right to rely upon the existence of a cargo ready for shipment as soon as the vessel should arrive at Caleta Buena.* The failure to provide that cargo was the default of the charterers. When the master of the vessel demanded the cargo, the charterers had none. *Their cargo had been contracted for, but had not been delivered to them.* They could not obtain possession of it."

You accordingly held that the charterer was liable for any delay suffered by the vessel. A like ruling was made by the House of Lords in the case of *Ardan S. S. Co. v. Weir & Co.,* (1905) A. C. 501, Lord Davey saying:

> "It has frequently been laid down, and may be taken to be established law, that the mere existence of circumstances beyond the control of the shipper, which make it *impracticable* for him to have his cargo ready, will not *relieve him from paying damages for breach of the obligation.*"

A like ruling has been announced by the highest appellate court of Scotland in the case of *Gardiner v. Macfarlane,* (1893) 20 Sess. Cas. (4th Series) 414, Lord Trayner saying:

> "For the present case it has been clearly shown that the direct cause of the Lismore's detention was that the charterer had no cargo to give her. Now, the obligation to *have* or *provide* a *cargo* is *not a charter obligation.* The contract of charter party *presupposes* that the charterer *has a cargo* or will have a cargo *ready for the ship when the ship is ready for it,* and accordingly the charter party provides that the ship shall proceed to a certain port and there 'take on board' or (as in this case) there 'receive' a cargo from the charterer."

The Circuit Court of Appeals for the Second Circuit agrees with our contention. In the case of *Atlantic & M. G. S. S. Co. v. Guggenheim,* 147 Fed. 103, the charter party provided that the cargo should be loaded on a vessel as fast as the vessel could receive the same. The Court said:

> "The respondents seek to construe the charter as if it read: 'The coke is to be loaded on board the vessels as fast as it is received at the wharf of the Louisville & Nashville Railroad Company at Pensacola.' It is enough that it does not so read. *The respondents covenanted to supply the schooners with cargo;* it was their duty to do so; they failed in this duty and the failure was the sole source of the demurrage."

In Scrutton on Charter Parties, 9th Ed. Art. 42, page 128, it is said:

> "In the absence of express stipulations qualifying it, the duty of the charterer to furnish a cargo according to the charter is absolute. The

charterer therefore will not be relieved from his express contract to load in a fixed time, or *from his implied contract to load in a reasonable time,* by *anything* preventing him from *bringing* a full and complete cargo to the place of loading."

STRIKE CLAUSE NO DEFENSE.

Now this *absolute* duty may be modified, it is true, by exception clauses in the contract, but as the shipowner has no possible means of preventing or lessening delays arising in the procuring of the cargo the exception clauses must, unless the contract intention is *clearly expressed,* relate to the *actual loading only.*

In *McLeod v. 1600 Tons of Nitrate of Soda,* 61 Fed. 849, 853, you said:

> "But it is contended in the second place that, while there may have been no interference with the act of loading, the delay is nevertheless excused by virtue of the last clause of the charter party, whereby the performance of all the charterers' covenants, including the covenant to 'furnish and provide a cargo' is excused if prevented by 'political occurrences,' etc., and that, if the charterers are excused from furnishing a cargo, they are likewise excused for delay in loading, since the cargo must be *furnished* before it can be *loaded.* It is sufficient to say in answer to this argument that no political occurrence is shown in this case which would serve to

release the charterers from the performance of any of their covenants. The substance and effect of the covenant to provide and furnish a cargo was that the charterers would deliver a cargo within reach of the ship's tackle, for the purpose of loading. They did not covenant to purchase or acquire a cargo. *With the procurement of the cargo,* the shipowner had no concern. The charterers were to provide a cargo, and the owner was to provide a ship. *In such a case the charterer may be presumed to have his cargo under control.* If a political occurrence should prevent him from delivering a cargo or moving a cargo, the excuse contemplated in the charter party would exist; but when the intervention of the political occurrence is *carried further back,* and is made to apply to the *procurement* of a *cargo in the market,* the *contingency* is *too remote* to have been contemplated by the parties, unless the language of the charter party so expresses by *clear and unmistakable terms.*"

The foregoing statement concurs with all authority.

In the case of *Grant and Co. v. Coverdale, Todd and Co.,* decided by the House of Lords in March, 1884, 9 A. C. 470, the Lord Chancellor said:

"No doubt for the purpose of loading the charterer must also do his part; *he must have the cargo there to be loaded,* and tender it to be put on board the ship in the usual and proper manner. Therefore, the business of both parties meets and concurs in that operation of loading. When the charterer has tendered the cargo, and when the operation has proceeded to the point at which the shipowner is to take

charge of it, everything after that is the shipowner's business, and everything before the commencement of the operation of loading, those things which are so essential to the operation of loading that they are conditions *sine quibus non* of that operation, everything before that is the charterer's part only. It would therefore appear to me to be most unreasonable to suppose, unless the words make it *perfectly clear* that the shipowner has contracted that his ship may be detained for an unlimited time on account of impediments, whatever their nature may be, to those things with *which he has nothing whatever to do, which precede altogether the whole operation,* which are no part whatever of it, and are perfectly distinct from it, but *belong to that which is exclusively the charterer's business.* He has to *contract* for the *cargo,* he has to *buy* the *cargo,* he has to convey the cargo to the place of loading and have it ready there to be put on board, and it is only when he has done those things that the duty and the obligation of the shipowner in respect of the loading arises. These words in the exception are as large as any words can be. They mention 'strikes, frosts, floods, and all other unavoidable accidents preventing the loading.' If, therefore, you are to carry back the loading to anything necessary to be done by the charterer in order to have the cargo ready to be loaded, *no human being can tell where you are to stop.* The bankruptcy, for instance, of the person with whom he has contracted for the supply of the iron, or disputes about the fulfillment of the contract, the refusal at a critical point of time to supply the iron, the neglect of the persons who ought to put it on board lighters to come down the canal for any distance, or to be brought by sea, or to put it on the railway, or bring it in any other way in

> which it is to be brought. All those things are of course practical impediments to the charterer having the cargo ready to be shipped at the proper place and time, but is it reasonable that the shipowner should be held to be answerable for all those things, and is that within the natural meaning of the word 'Loading'? Are those things any part of the operation of loading?"

It is true that in that case the language of the charter party was that frosts, floods, or any other unavoidable accidents preventing the loading and unloading were excepted, and that it might be argued that the introduction into the charter party of the words "loading" and "unloading" clearly showed that the exceptions only applied to the work of loading or unloading. We have pointed out however, that "The exceptions usually contained in a charter party are, *unless the contrary intention is clearly expressed,* to be understood as applying *only to the actual loading.* They do not, therefore, protect the charterer against the consequences of delay or failure in matters which precede the loading and form no part of it." Halsbury's Laws of England, §286.

Moreover, in the *McLeod Case* you, in referring to the case of *Grant & Co. v. Coverdale, Todd & Co.,* said:

> "The agreement in that case referred to *delay in loading only,* but the *reasoning* contained in the decision is applicable to the case at bar." (61 Fed. 854.)

Now, there is nothing in the language of the charter party in this case which can refer to the cutting of the timber and the sawing of it into lumber. The use of the phrase "accidents on railways" might be held to refer to the transportation of the sawn lumber to the point of actual loading. It certainly cannot refer, however, to a strike in a lumber camp which has made it impossible to cut down the trees. If it can, then it could be fairly argued that a fire in a plant engaged in the furnishing of saws for the cutting of timber would relieve the charterer from the absolute duty imposed upon him of procuring a cargo, a duty not imposed upon him by the charter party, but imposed upon him by law. Moreover, it will be remembered that the charter party in this case was prepared by Hind, Rolph & Company. The printed blank which was filled out in this case is a blank *prepared* and *printed* by Hind, Rolph & Company, and if there is any doubt as to the meaning of the terms employed, the instrument is to be construed against the charterers.

In *Dampskibsselskabet Danmark v. Paulsen & Co.* (1913) Sess. Cas. 1043, the Court said:

"It is, of course, well-settled law that (to use the often quoted words of Lord Blackburn in *Postlethwaite v. Freeland*) 'in the absence of something to qualify it, the undertaking of the merchant to furnish a cargo is absolute.' If he fails in that undertaking, he will certainly, apart from special contract, be liable in demurrage. For the contract one must look to the charter-party; and though, of course, a charter-party may be so framed as to exempt the charterer, under specified circumstances, from his absolute legal obligation, I think the exemption must be *expressed in very clear language*. The contract must, I apprehend, be *strictly* read. The Court will *not lightly* infer that the shipowner has agreed to relieve the charterer from liability for delays which he (the owner) *has no possible means of preventing or lessening;* still less for delays which the charterer himself could, by due diligence, have avoided."

See also:

Ardan S. S. Co. Ltd. v. Mathwin (1912) Sess. Cas. 211.
Halsbury's Laws of England, §286.
Carver on Carriage by Sea, 6th Ed., §257.
MacLachlan on Merchant Shipping, p. 582.
Am. & Eng. Enc. of Law, 2nd Ed., Vol. 9, p. 245.

OTHER HINDRANCES.

Appellants further contend that if the word "strike" as used in the exception clause in the charter party does not exonerate them from delay caused

by a strike in the logging camps or lumber mills of Puget Sound, nevertheless another phrase in the exception clause, to-wit, "or any *other* hindrances beyond the control of either party to this agreement or their agents," does relieve them. We have shown, we think, that the entire exception clause relates only to the actual loading of the cargo. This, we think, would be sufficient to dispose of this objection, but there is another principle which is fatal to appellants' contention: The words above quoted are to be construed on the *ejusdem generis* principle.

In Halsbury's Laws of England, Vol. 26, p. 139, it is said:

> "General words, if preceded by words of more specific application, are to be construed as limited to things *ejusdem generis* with those which have been specifically mentioned before."

In *Gardiner v. Macfarlane,* 20 Rettie, p. 414, Lord Trayner said:

> "The exception clause in this charter is a very *broad* one, but the defenders cannot defend this claim or excuse the detention of the ship on any of the special grounds set forth in the clause. They rely on the concluding general words, 'or any other hindrances of what nature soever beyond the charterers' or their agent's control.' These general words, however, do not appear to me to afford to the defenders the defence they found upon them. Words of a general nature such as these now under consideration are generally restricted in their ap-

plication to causes of a like kind to those previously enumerated, and so reading them they will not in this case cover the cause of the ship's detention. But reading them in the *widest* sense they only cover causes which conduce to the *failure* of the *charterers' obligations under the charter.* For the present case, it has been clearly shewn that the direct cause of the 'Lismore's' detention was that the charterers had no cargo to give her. Now, the obligation to have or provide a cargo is not a charter obligation. The contract of charter-party presupposes that the charterer has a cargo, or will have a cargo ready for the ship, when the ship is ready for it, and accordingly the charter-party provides that the ship shall proceed to a certain port, and there 'take on board' or (as in this case) there 'receive' a cargo from the charterer. * * * If, therefore, the *providing* of the *cargo* is *not* a *charter obligation,* the exception clause does not cover it, nor afford any exemption from liability in respect of its non-performance."

See also:

Hutchinson on Carriers, 3rd Ed., p. 933.
Thorman v. Dowgate S. S. Co., 11 Asp. 481, 484, 485.
Owners of Steamship Knutsford v. E. Tillmanns & Co., 11 Asp. 105, 111.
Re Arbitration between Messrs. Richardson and Samuel and Co., 8 Asp. 331.
Mudie v. Strick & Co., 14 Comm. Cas. 135.
Carver on Carriage by Sea, 6th Ed., §258a.
Lewis' Sutherland on Statutory Construction, §§422 *et seq.*
Endlich on Interpretation of Statutes, §§405 *et seq.*
Hadjipateras v. Weigall & Co. (1918) Weekly Notes, p. 113.

Moreover, apart from authority, how can this general phrase aid the appellants in this case? The word "strikes" either relates to *loading only* or it relates to all strikes, namely, strikes affecting the bringing of the cargo into existence as well as the loading of the cargo. But if the word "strikes" covers *all* kinds of strikes, then the general clause certainly does not relate to strikes, for strikes are already covered. If, however, the word "strikes" covers strikes occurring only in connection with the actual loading of the cargo, then under the *ejusdem generis* principle the general clause must also relate to hindrance in the operation of loading.

In the case of *Abchurch Steamship Co. Ltd. v. Hugo Stinnes,* 1911 Session Cases, p. 1010, Lord Kinnear, in commenting upon a clause similar to the one here involved, said:

> "As to the second ground for restriction of the general words, it was argued that the causes specifically enumerated are not of one *genus,* and that, therefore, the rule cannot be applicable to the general words, because we cannot find one common characteristic of the enumerated causes. I do not think that is sound, because, in the first place, the general words must be subject to some restriction since they are expressly brought into the clause to provide for exceptions, and not for a general rule. *And if they were to be interpreted in their most uni-*

versal sense, the specific enumeration of exceptions would be futile, and the general rule would be swept away—there would be no meaning in it. The clause, in that view of it, would have been properly framed by excepting all causes of detention except the fault or negligence of the charterer."

See also:

Jenkins v. L. Walford (London), Ltd. 87 Law Journal, (K.B.) p. 137.

In order to escape the force of these authorities, counsel now contends that the case of *Larsen v. Sylvester,* 11 Asp. 78, decides that the general phrase is not to be construed on the *ejusdem generis* principle. (Appellants' Brief, p. 36.)

The exception clause under consideration in that case was as follows: "Frosts, floods, strikes, lock-outs of workmen, disputes between master and men, and any other unavoidable accidents or hindrances *of what kind soever* beyond their control preventing or delaying the *working,* loading or shipping of the said cargo." The House of Lords held that in view of the above language the charterer was relieved from liability not only by hindrances *ejusdem generis* with frost, floods, etc., but by any hindrance *of what kind soever* which prevented the working, loading or shipping of the cargo. The charter party

here involved, however, does not except any hindrance *of what kind soever.* If the view of counsel for appellants is correct the words "of what kind soever" are surplusage and are not the basis of the court's decision. These words, however, were not surplusage. They were the *ground of decision in that case.* In the Divisional Court, Phillimore said:

> "It seems to me plain that, when people say 'accidents or hindrances *of what kind soever'* they mean that which they appear to say—that is, all other accidents or hindrances, and not merely those *ejusdem generis* with those mentioned."

On appeal the Lord Chancellor said:

> "It is sufficient for me to say that in the case of *Earl of Jersey v. Guardians of the Neath Union* (22 Q.B. Div. 555) Fry, L.J., referred to words of a very similar kind, and indicated what, I think, is perfectly true—namely, that you have to regard the intention of the parties as expressed in their language, and that words such as these, 'hindrances *of what kind soever,'* very often are intended to mean, as I am sure they are in this case intended to mean, exactly what they say."

Lord Ashbourne said:

> "When parties put in words of that kind, which are obviously of considerable width, and put them in after consideration, not stopping short at any ordinary general term, but putting in 'hindrances *of what kind soever* beyond their

control,' it is obvious that the more natural construction would be to assume that they meant something operative and did not mean to use blind words to be dismissed by the phrase that they were only *ejusdem generis.*"

Lord Robertson said:

> "I base my judgment solely upon this: The parties, I think, have realized, or at least may well be held to have realized, the applicability of that rule to such contracts and they insert these words *'of what kind soever'* simply for the purpose of excluding that rule of construction."

In *France, Fenwick & Co. v. Philip Spackman & Sons,* 12 Asp. 289, 291, Bailhache, J. said:

> "I do not intend to go at length into the cases, which during the last few years, have dealt with the *ejusdem generis* rule of construction; it is sufficient for me to refer to *Larsen v. Sylvester* and *Thorman v. Dowgate Steamship Company.* In the former of these cases the general words were *'of what kind soever,'* and the House of Lords held that by the use of *those words* there was a sufficient expression of intention to exclude the ordinary *ejusdem generis* rule. In *Thorman Dowgate Steamship Company* the general words were *'any* other cause,' and Hamilton, J., decided that there was no sufficient indication to override the well-known *ejusdem generis* rule."

See also:

> *Thorman v. Dowgate Steamship Co. Ltd.,* 11 Asp. 486.

Sec. 258, Carver's Carriage by Sea (6th Ed.), last paragraph, and Note F to Sec. 165.
MacLachlan on Merchant Shipping, p. 584 (5th Ed.).

REASONABLE TIME CHARTER-PARTY.

Counsel for appellants asserts that under the form of charter-party in this case the charterers were not bound to have a cargo ready for the ship when the ship was ready for the cargo, but that the charterers were bound to exercise due diligence only to see that a cargo was brought into existence. The reasons assigned for this contention are:

(1) The agreement of the captain to give a demurrage release;

(2) That the charter-party contains no provision for lay days nor does it fix the exact date on which loading is to begin.

(1) We have heretofore set forth in too abundant detail the conditions under which the Captain agreed to sign the demurrage release. We say now only this—we think it absurd that the act of the Master, an act wholly unauthorized and promptly repudiated by the ship owner, can change the contract of the parties. The determination as to whether there was any valid excuse for the delay rested not with the Master but with Mr. Ostrander.

The discussion which follows is to be considered not only as an answer to the contentions made by the appellants in this case, but also as a reply to the contentions which we think they will advance in the appeal taken by us. As a matter of fact there is no need, so far as this appeal is concerned, to discuss the law relative to a reasonable time charter-party. We say this because the evidence in this case discloses that the delay experienced by the boat after it arrived at Port Angeles was not due to a strike or to commandeering of the Mill Company's yard by the Government. The trial court so found. (441-445.)

Pretermitting, however, at this point any discussion of the facts, we shall consider the legal contentions advanced by appellants at Page 32 of their brief.

(2) It is asserted that the charterers are not liable for the delay between October 18th and November 24th because by agreement of the parties the commencement and duration of lay days was intentionally left undefined, and that as a corollary thereof the charterers had a reasonable time in which to do their work, which work was the bringing of the cargo into existence. It is true that if no fixed time for loading is specified in the charter-party, the law gives the charterer a reasonable

time in which to perform *the actual work of loading,* but this is a very different thing from saying that the charterer can, unless by a clear clause in the charter-party, be excused from delay in bringing cargo into existence. It is also true that the charter-party in this case does not expressly prescribe when the lay days shall commence, nor does it provide that the loading shall be accomplished in a certain number of days. But the charter-party is not *wholly destitute of terms relative to the commencement of lay days.* It does provide that lay days shall not commence before the first day of July, 1917, unless at charterers' option. (14) It also provides that if the vessel does not arrive at the port of loading before noon of 31st day of August, 1917, the charterers have the right to cancel the charter party. (14) In other words, the charterers inserted a provision that the lay days should not commence *before the first of July.* They also provided that if the vessel was not ready to load by *August 31st,* the charter, at their option, might be cancelled. The charter party, therefore, we think, clearly contemplated that lay days should commence some time in *July* or *August.*

Maugre this, we say again that even in a reasonable time charter party the charterer is excused for delay in *actual loading only.*

In Scrutton on Charter Parties, Ninth Edition, page 321, it is said:

> "*If no fixed time for loading* (or unloading) is stipulated in the charter the law implies an agreement on the part of the charterer to *load* or *discharge* the cargo within a reasonable time, and, so far as there is a joint duty in loading or unloading, that the merchant and shipowner shall each use reasonable diligence in performing his part.
>
> "In the absence of express provisions, there is an *absolute undertaking* on the part of the charterer *to have cargo ready* to load, and a reasonable time for *loading THEN* begins. On a like principle, at the other end of the voyage, what is in question is the reasonable time for discharge. Therefore difficulties in getting the cargo away to an ulterior destination after the *actual discharge* are not to be taken into account."

In Carver on Carriage of Goods by Sea, Sixth Edition, Section 617, it is said:

> "But though the charterer, where no time is fixed for loading or unloading, does not come under any obligation to have the work completed in any particular time, and is excused if the work is delayed by causes beyond his control, *he will not be excused for delay caused by failure to have the cargo ready.*
>
> "Unless expressly excused, the charterer is bound, *so far as provision of the cargo* is concerned, to be *ready to proceed with the work without delay.* The cargo must be *ready* at the *proper place for loading.* The charterer cannot

> set up the excuse of *vis major* for delay in these matters."

Judge DeHaven announced the same doctrine in the case of the *Schooner Mahukona Co. v. 180,000 Feet of Lumber,* 142 Fed. 578, at page 582:

> "But the rule of reasonable diligence, when that is all that is called for by the contract, is not applicable to a contract of charter by which the *charterer has bound himself to furnish a cargo* and have it ready for delivery to the vessel. This distinction is noticed in Section 617 of Carver's Carriage by Sea, in which that author says: (Quoted above)
>
> "It necessarily follows, from what has been said, that the charterer was in *default in not having a cargo ready for delivery* so as to give the vessel reasonable dispatch."

In the case of *Postlethwaite v. Freeland,* 5 A. C. 599, 4 Asp. 302, it was held that the charterer was not liable for the delay in the *actual discharge* of a vessel due to his inability to procure a sufficient number of lighters to take the cargo from the vessel. Lord Blackburn, however, in his opinion pointed out that while a charterer might be relieved from liability for delay in the *actual discharge* of the vessel, nevertheless he *was not relieved* from liability for any delay in the *loading* of the vessel *due to the charterer's failure or inability to provide a cargo.*

After quoting the statement of Lord Ellenborough that "The merchant is the adventurer who chalks out the voyage, and is to furnish at all events, the subject-matter out of which the freight is to accrue," Lord Blackburn continues:

> "I am not aware of any case contradicting the doctrine that, in the absence of something to qualify it, the undertaking of the merchant to furnish a cargo is absolute. And if the obtaining lighters or other customary appliances for the discharge of a ship on its arrival was *like the procuring a cargo for loading the ship,* a matter which fell entirely on the merchant, so that he might choose his own mode of fulfilling it, I am not prepared to say that on the same principle he ought not to be held to undertake, without qualification, to provide those appliances. * * * But I do not think that the undertaking to supply lighters or other appliances to assist in discharging the ship does fall within the same principle as the *undertaking to supply a cargo.*"

In the case of *Gardiner v. Macfarlane* (1893), 20 Rettie 414, the Court said:

> "I am of opinion that difficulty in obtaining a cargo on account of the output at the colliery which the charterers had selected being restricted is a matter with which the shipowners are not concerned, and *the consequence of any delay arising therefrom must fall on the charterers.*"

Moreover the House of Lords in the case of *Ardan Steamship Co. v. Weir & Co.* (1905), A. C.

501, 10 Asp. 135, 11 Com. Cas. p. 26, expressly approved the above statements made in the cases of *Postlethwaite v. Freeland* and *Gardiner v. Macfarlane.*

Now the charter parties involved in the cases just cited contained provisions almost identical, as to lay days and time of commencement of loading, with the provision of the charter party in the case at bar.

In the case of *Schooner Mahukona Co. v. 180,000 Feet of Lumber,* 142 Fed. 578, Judge DeHaven said:

> "The contract of charter contained no express provision in relation to lay days, nor any stipulation fixing the time within which the vessel was to arrive." (Top of page 579.)

and again:

> "The contract contained no stipulation for lay days, and fixed no time within which the vessel was to arrive and be ready to receive her cargo." (Middle of page 581.)

In that case, we may say, the schooner at the time of the execution of the charter party was bound on a voyage from the Philippine Islands to Puget Sound. Her arrival at Puget Sound was certainly as indefinite as the time when the Schooner Ostrander would be completed. Owing to storms and stress of weather the "Mahukona" did not

arrive for a period of *over sixty days* after her expected due date. She was posted at the Merchants' Exchange in the City and County of San Francisco as *lost*. Charles Nelson Company thereupon procured another vessel to take the cargo provided for the "Mahukona" at Everett, and then claimed that when the "Mahukona" finally arrived at Everett the mill to which she was dispatched had no lumber on hand and was shut down to make necessary repairs; that after her arrival at Everett they, with due diligence, caused sufficient lumber to be manufactured to furnish a cargo for her. Judge DeHaven, however, held that the undertaking of Charles Nelson Company to supply a cargo was absolute and that the charterer was liable for the delay incurred by the vessel in awaiting the manufacture of the cargo.

In *Gardiner v. Macfarlane,* 20 Rettie, 414, the charter party contained a cancellation clause similar to the one in the charter party involved in the case at bar. Lord Trayner said:

> "The charter party was entered into in *March,* 1888, at Glasgow, and (from the clause authorizing the charterers to cancel it 'if vessel do not arrive at Sydney on or before 30th *September,* 1888') it may be inferred that the 'Lismore' *was expected to be at Sydney at latest before end of September.*"

In that case, therefore, liability was cast upon the charterer by reason of his failure to have a cargo ready for the ship.

In the case of *Ardan S. S. Company v. Weir & Company,* Vol. 6, Court of Session Cases (5th Series,) page 294, affirmed by House of Lords (1905) A. C. 501, the provision in the charter party was as follows:

> "Should steamer not arrive at her loading port and be ready to load on or before the 15th July charterers to have the option of cancelling this charter; lay days not before 25th June."

The charter party did contain a provision as to the *time in which* the cargo was to be *discharged,* but "there was *no* provision as to the *time within which* the ship was to be *loaded.*" 6 Sess. Cas. (5th Series) 294.

The provision, therefore, in the charter party involved in the *Ardan* case is identical with the provision in the charter party involved in the case at bar. The charterers in the Ardan case were held liable for their failure to have a cargo ready for loading, and if that decision is right the charterers in this case should also be held responsible.

The authorities cited by appellants and asserted as laying down a contrary rule are entirely consistent with our position. We have already quoted

from Section 617 of Mr. Carver's work on Carriage by Sea. Section 610, quoted by appellants in their brief at page 19, is in harmony with the position which we have taken. The work to which Mr. Carver refers in Section 610 is not the charterer's work of *preparing and procuring* the cargo, but is the work of *actual loading.* A mere reading of the first paragraph in Section 610 and Section 611 will show that we are correct. The work therein referred to is the work of actual loading. Again, in Section 615, Mr. Carver is discussing the responsibility, or lack of it, on the part of the charterer in the *actual loading* of the vessel.

The case of *Empire Transportation Co. v Philadelphia Co.,* 77 Fed. 919, is also not in point. In that case it was sought to hold the charterer liable for a delay in the work of discharging the boat. The delay was due to a strike. We have no quarrel with the proposition that in a reasonable time charter party the charterer is relieved from any delay either in the actual *loading* or *unloading* of the boat when such delay is occasioned by a strike. The delay in this case, however, was not due to a strike which hindered the loading, but if the strike affected the matter at all it affected the preparation and procuring of the cargo.

The case of *Richland S. S. Co. v. Buffalo Dry Dock Co.,* 254 Fed. 688, relates to a delay in the repair of a vessel. A mere reading of that case will convince that it is not applicable here.

It is, however, argued that the cargo was to be procured from a *particular place* and that the parties to the contract contemplated that the procuring of the cargo from such place might be delayed. The evidence in this cause does not support such assertion and the case on which reliance is placed, *Jones, Ltd. v. Greene & Co.,* 9 Asp. 600, 9 Com. Cas. 20, is not in point. That case was an exceptional one and has always been so regarded.

The charter party there in dispute provided that "the ship shall with all possible dispatch proceed to such loading *berth* as freighters may name at Newcastle, New South Wales, *and after being in a loading berth as ordered,* wholly unballasted and ready to load, shall there load in the usual and customary manner a full and complete cargo of ..... coals, as *ordered* by charterers, which they bind themselves to ship." It will be noticed, in the first place, that the charterers had a right to ship a *certain specific kind* of *coal.* Shortly after the execution of the charter party they elected to ship a coal called "Wallsend coals." It was *known* both to *shipowner* and charterer *at the time*

of the execution of the charter party "that the port of Newcastle, New South Wales, serves a limited number of collieries which are adjacent to that port, and serves no other collieries whatsoever. The whole of the coal which is loaded at Newcastle, New South Wales, is the coal which is the product of these collieries. It was known also to both the parties to the contract that the output of these collieries was a very limited output, not exceeding 1100 tons a day; and also that if sailing ships went to this port of Newcastle, New South Wales, the loading would have to take place according to the regulations of the port there, and that a ship could only get a loading berth if what is called a 'loading order' had been obtained from the colliery—that is to say, if the circumstances were such that according to the colliery turn that vessel was entitled to have such loading order. It was also *known* to *both* of the parties here that *sailing ships undoubtedly were detained a very long time before they could in ordinary course get their loading order from the colliery. This very ship,* the *Snowdon,* in the year previous to the year of this charter party, had to wait *eighty-three days* in order to get a loading order according to the colliery turn."

Vaughan Williams, L. J., in distinguishing the facts in *Jones v. Greene* from those in *Kearon v. Pearson,* said that the distinction arose from the fact that in *Jones v. Greene* the *precise colliery* from which the coal was to come was *expressly defined.*

> "When that is so," he said, "I think it is impossible to lay down an absolute rule that the charterer undertakes an unqualified obligation to have the cargo ready whenever it may be reasonably expected that there may be a berth for the ship if the cargo is ready. *It may be so sometimes,* but it is impossible to say that it must be so. Now, in the present case, what is the contract so far as the source of coal is concerned, and what is the knowledge of the parties to the contract? I take it that one cannot exclude the knowledge of the parties in the consideration of this matter, because, after all, what we have to consider here is, what was a reasonable time either for the provision of the cargo or for the commencement of the loading, and, when you are considering what is a reasonable time, it seems to me obvious that you must take into consideration those circumstances, *which were known* to both parties to the contract *at the date of the contract,* and were taken into consideration by both the parties as affording the basis and foundation of the contract."

He then sets out the knowledge which both parties to the contract had. Continuing, he says:

> "As the result of all that, I have come to the conclusion that *all* the parties to this contract *assumed* as the *basis* of the *transaction*

that there *would* and *must* be more or less *delay,* according to the loading turn at the colliery. I have only one more word to say about this. It is true that the correspondence took place between the parties after February, which was the date of the charter-party, still, when it is considered, I cannot help seeing from that correspondence that the charterers and shipowners, both of them, were *contracting* in view of this state of things; and really as time went on and it came to the knowledge of the parties that there was likely to be a long 'stem,' as it is called in the correspondence, both parties assume that this long 'stem' is a *burden* which *both* will have to bear, and that neither party takes upon himself the risk of the long 'stem'; and, eventually, when it is certain that the waiting will be for a long time, the shipowners write to the charterers to ask the charterers to try, *as a matter of grace,* if they can get the purchasers of the cargo, who had purchased Wallsend, to change it to some other coal, and, although the charterers did their best, they were unable to effect this. It seems to me that all these things which I have referred to clearly bring this case within the authority of Harris v. Dreesman."

Lord Romer and Lord Stirling both concurred, both citing as authority for their position the case of *Harris v. Dreesman* and the case of *Little v Stevenson.*

Now, the cases of *Harris v. Dreesman,* 23 L. J. 210, and *Little v. Stevenson,* 74 L. T. Rep. 529, 8 Asp. 162, are exceptional cases and have always been so considered.

In *Harris v. Dreesman* it appears that on the day the charter party was signed, the master of the vessel went with the defendant Taylor to the office of the colliery at which the ship was to be loaded, where they were told that an accident had happened to the boiler of the steam engine in the colliery, in consequence of which the colliery was off work, and that the "Julianna's" turn would be a few days after the colliery got to work, which was expected would take place in the middle of the following week. *After* this conversation took place and the captain was advised that no cargo was or could be had until the engine was repaired, *the defendant Taylor signed the charter party.* It took somewhat longer, however, to repair the engine than was anticipated, but the vessel was loaded in her turn after the engine started. The lower court held the charterer liable for the delay. On appeal the Court said that the evidence was deficient in that it did not show either that the boiler was repaired and the colliery got to work within a reasonable time after the charter party was executed or that the vessel was loaded within a reasonable time after the colliery got to work. The Court further held that if it was found that both of the above mentioned acts were done within a reasonable time, the charterer was exempted; but that if the

repair was not made within a reasonable time or the boat not loaded within a reasonable time after the repair was made, then, in either event, the charterer was liable.

In *Little v. Stevenson,* the charter party provided that the ship should proceed to Bo'ness and receive a cargo of coals to be supplied by the charterers, "lay days to count from the time the master has got the ship reported berthed and ready to receive cargo." The ship reached Bo'ness on the 19th of October, and the charterers were informed of the fact. In consequence of the crowded state of the docks she was not allowed to enter in her ordinary turn until the 26th. She was loaded within the time allowed by the charter party and sailed on the 28th. The claim for demurrage in that case, however, was based upon the fact that a berth in the dock happened to become vacant, *accidentally,* on the 21st, and that if the cargo had been ready the ship could have been berthed on that day *out of her turn.*

It is obvious that the shipowner in that case could recover only in the event that it was the duty of the charterer to have a cargo ready if what the Court denominated "a *remote* and *improbable contingency*" should happen.

That our construction of the case of *Little v. Stevenson* is correct is shown from the following language in the opinion of Lord Halsbury in the case of *Ardan Steamship Co. v. Weir & Co.* He said:

> "I am very sorry if any observations of mine or of the late Lord Herschell's have been supposed to throw any doubt upon so well recognized a principle of commercial law as that a merchant is under an absolute obligation to supply the cargo. The case which is supposed to have created the doubt is *Little v. Stevenson,* and the passage referred to begins: 'The proposition of law that I disputed was that a merchant must be always ready with his cargo at all times and in all places, and under all circumstances, to take advantage of any *such contingency, if it should arise.*' And Lord Herschell observed: 'It is alleged that the obligation existed in point of law, that at all ports, under all circumstances, however *unreasonable* it might be to *anticipate* such a *contingency,* however deficient the quay might be in the means necessary for storing, or protecting, or preserving cargo, whatever difficulties there might be, in short, that was an obligation always resting upon the shipper.' I thought then, and I think still, that, to use Lord Herschell's language, such an obligation on the shipper would be most unreasonable. But what relevancy had such a case to the case before your Lordships? The controversy turns, as the Lord Ordinary finds, upon the true construction of the charter-party in view of the facts as proved. I also agree with the Lord Ordinary that delay in the loading is one thing, and the failure to provide a cargo to load is another and a

> very different thing. He found as a fact that the failure of the defenders to perform their primary duty of providing a cargo was the cause of the delay."

Now returning to the case of *Jones, Ltd. v. Greene & Co.,* how does that case avail appellants here? In that case the charterer had an option to provide a particular and specific kind of coal. The shipowner knew that the output of that particular colliery was limited. He knew that by the regulations of the port of Newcastle he could not get a loading berth until a loading order had been obtained from the colliery. He knew that sailing ships were detained at Newcastle a very long time before they could get their loading order from the colliery. He knew that his own ship had been detained at Newcastle the year before for a period of eighty-three days in order to get a loading order according to the colliery turns. He knew this when the contract was executed. After the execution of the contract and after the arrival of the boat at Newcastle a correspondence took place between the parties, which the Court says shows that a long stem at Newcastle was a burden which both parties would have to bear.

But what did Mr. Ostrander know? The charter party was executed in May. There was no strike in May. He knew that the charter party provided

that the charter could be cancelled on August 31st if he was not ready. He knew that Hind, Rolph & Company should be expected to have the cargo ready any time after July 1st. He knew that they regarded the boat as one sailing in July or August (Libelant's Exhibit 1-C). He knew on May 26th, that the contract for the purchase of the lumber had already been made. (Libelant's Exhibit 1-B.) He knew that the cargo, if not already cut, could be cut by several mills on Puget Sound in from ten to fourteen days. He did not know that a strike would occur. He did not know that any delay would occur. He did not know of the business method and practices of the Charles Nelson Company,—methods and practices denominated by Hind, Rolph & Company, in one instance at least, as "very unjust and highhanded procedure," methods and practices which Hind, Rolph & Company were compelled, in other instances, to repudiate.

Moreover, it will be noticed that the case of *Ardan Steamship Co. v. Weir & Co.,* 10 Asp. 136, was an *appeal* from the First Division of the Court of Sessions in Scotland. The basis of the decision of the Court of Sessions was the opinion of Vaughan Williams in the *Jones Case.* The opinion in the *Jones Case* was *pressed* upon the House of Lords in the *Ardan Steamship Co. Case.* Lord Halsbury,

without mentioning the *Jones* decision, referred to it in the following language:

> "I think it quite immaterial to discuss cases in which it is either proved or assumed that there are particular circumstances known to both the parties, with reference to which they may be supposed to contract, which may affect both the providing and the loading of the cargo. It is enough to say that no such question arises here."

Lord Davey said, after referring to the case of *Harris v. Dreesman*:

> "I think that the opinion of the Lord President was founded on some such consideration. His Lordship thought that there were circumstances in this case known to both parties which prevented the obligation of the charterers possessing the absolute character alleged. The learned judge referred to the evidence on cross-examination of Mr. Clark, a member of the firm who were managing owners of the vessel and effected the charter-party with the respondents for this voyage. Mr. Clark appears to have had some previous experience with regard to sailing ships loading cargoes of coal at Newcastle; but he did not know with what colliery the respondents would make arrangements, and, in fact, he did not know the various collieries at Newcastle, and only knew some of them by name. But even if he must be taken to have known the usual and customary manner or the conditions of loading at the port, that is not the point. *The complaint here is not of delay in loading but of delay in procuring the cargo.*"

It will be remembered that in the case of *Jones v. Greene,* the vessel was to go to Newcastle. In *Ardan Steamship Co. v. Weir & Co.,* she was to go to the same port.

In both cases a *particular specific* kind of coal was to comprise the cargo. The delay arose from the same cause. Unless, therefore, the cases can be reconciled in some manner, the decision of the Court of Appeals in *Jones v. Greene,* has been overruled by the decision of the House of Lords in *Ardan Steamship Co. v. Weir.* It is immaterial to us which view is adopted. Mr. Scrutton apparently thinks that the *Jones Case* has been overruled, for he says:

> "It is very difficult to reconcile the decision of the House of Lords in this last case with that of the Court of Appeals in *Jones v. Greene.*" Note (h) to Art. 42, Scrutton on Charter Parties (9th Ed.).

If the cases are reconcilable, they are reconcilable only on the theory that the owners of the ship "Snowdon" *knew positively* at the time of the execution of the contract that a delay would take place, while the shipowners in the *Ardan Case* did *not positively* know such fact when the contract was entered into. This is the view of Mr. Carver. He says:

> "This (*Jones*) case was cited, but not discussed by, the House of Lords in *Ardan Steam-*

> *ship Co. v. Weir;* but, it seems, it can be distinguished from that case and justified on the ground that the special conditions, affecting the procuring of a cargo at the port, were *known* to both parties *at the date of the contract.*" Carver on Carriage by Sea, §254.

Appellants also take the position that the *Jones Case* decides that the charter party, in effect, provided that the cargo in this case was to be procured from the Puget Sound Mills & Timber Company at Port Angeles. Again the facts in the two cases differ widely. In the *Jones Case* the charterer had a right to prescribe that a particular and specific kind of coal should be loaded. This coal could, of course, not be obtained from but one place. The output of no two mines is alike. In the case of two mines side by side the coal produced by one mine may be far superior in heating capacity or in low percentage of ash to the other. If the charterer in a coal contract has the right to specify the particular kind of coal, he is under no obligation to furnish a cargo of another kind. If he does so it is only an *act of grace* on his part. But no such considerations are present here. Sawn lumber is sawn lumber and it makes no difference whence it is procured. The Ostrander cargo could have been procured from at least fifty mills. True, it was export lumber; but the testimony of Mr. Allen shows that there were a large number of mills in

the Puget Sound district capable of cutting export lumber. The South African purchasers of this cargo did not require that it be cut only at the Port Angeles mill. Moreover, Hind, Rolph & Company secured Mr. Ostrander's consent to a modification of the charter party so that the cargo could be cut at Mukilteo as well as at Port Angeles. And in all the correspondence down to October 12th it was stated that the cargo would be cut at both mills. The only reason that part of the cargo was not cut at Mukilteo was that the Crown Lumber Company was busy filling orders for vessels some of which were owned by Charles Nelson Company. (214.)

Again, in the case of *Gardiner v. Macfarlane* the charter party provided that the vessel should proceed to such *colliery* as *charterers* or their agents *might direct,* and there load a cargo of coal. The provision in this respect was like the charter party in the *Jones Case,* and unlike the charter party in the case at bar. The charterers in the *Gardiner Case,* as in the *Jones* and present case gave a prompt order to the manufacturers for the cargo. In the *Gardiner Case,* however, it is said:

> "The charterers appear to have informed their agents at Sydney without any loss of time that the charter-party had been entered into, for on 8th of May the agents wrote to

the colliery instructing them to book the 'Lismore' for a cargo of coals. But having thus ordered the coals for the 'Lismore,' as well as for two other vessels which were named, the agents seem to have thought that they had done all that could be required of them. And in ordinary circumstances, perhaps, no more would have been necessary to enable them duly to fulfill their obligation to load the 'Lismore.' They took no precautions, however, to secure that they would get coals for the 'Lismore' in due time, and took the risk of anything occurring which would prevent this. It is the chance so risked that has occurred.

"* * * In the second place, the fact (if it be a fact, which in this particular case is more than doubtful) that the charterer could not procure the commodity in the market (it not being there for sale), which he had bound himself to put on board the chartered vessel when that vessel was ready to receive it, is no excuse on the ground of 'hindrance over which he had no control,' for the non-performance of his obligation, any more than would be the excuse that having become bankrupt he had no money to purchase the commodity, it being procurable in the market."

In *Dampskibsselskabet Danmark v. Paulsen & Co.,* (1913) Sess. Cases 1043, the exception clause protected the charterer from strikes, etc., either preventing or delaying the *working,* loading or shipping of the cargo, but even under such a form of charter party the court made the following ruling:

> "Where there is, as here in fact, a delay in furnishing the cargo, I think the onus is on the charterer to prove not only that the delay arose from one or other of the specified causes which, by the contract of charter-party, are to form grounds of exemption, but also that he did all in his power, by way of reasonable precaution or exertion, to avoid it. *He is not entitled to fold his arms and do nothing, relying implicitly upon his clause of exemption.*"

THE INCLUSION IN THE CHARTER PARTY OF THE PROVISION THAT CHARTERERS WERE TO FURNISH THE CARGO CONSTITUTES NO DEFENSE

Counsel for appellants makes a still further argument. His contention, if we understand it, is as follows:

It was the *absolute duty* of the charterer to *furnish* a cargo, but the *time when* the cargo was to be furnished was to be determined in the light of the exception clause of the charter party. It is sought to distinguish the cases heretofore cited by us on the ground that in those cases the providing of the cargo was *not* a charter party obligation, while in the case at bar the procuring of the cargo *was* a charter obligation. (Appellants' Brief, 35.) The basis of this distinction is sought to be found in that clause of the charter party which provides

that "B. Said party of the second part doth engage to *furnish* to said vessel * * * a full cargo of sawn lumber." (11.)

It is inferentially, at least, argued that the charter parties involved in the cases of *Gardiner v. Macfarlane, Ardan S. S. Co. v. Weir,* and *McLeod v. 1600 Tons of Nitrate of Soda,* provided that the charterer agreed to load the cargo *whenever the ship should be ready to receive it,* (Appellants' Brief, 35) and that consequently the providing of the cargo was not subject to the exceptions of the charter.

We think that appellants' contention is wholly unsound, even if his statement as to the conditions in the various charter parties was correct. We need not explore this proposition, however, for the reason that the alleged distinction between the conditions of the charter party in the case at bar and in the cases heretofore cited by us *does not exist.* The precise contention made here was made only to be repudiated by this court in the *McLeod* case, 61 Fed, 849, 852. The charter party in that case provided that J. W. Grace & Company *"do engage to provide and furnish* the said vessel during the voyage aforesaid with a full cargo." Now, if the furnishing of a cargo is a charter obligation in the case at bar, it was equally a charter obligation

in the *McLeod* case. You said, however, that the delay in that case

> "arose from the fact that the *charterers had no cargo to load.* In entering into the charter party the shipowner placed his vessel at the disposal of the charterers for the stipulated time and voyage. *He had the right to rely upon the existence* of a *cargo ready for shipment* as soon as the vessel should arrive at Caleta Buena. The *failure to provide* that cargo was the default of the charterers. When the master of the vessel demanded the cargo, the charterers had none."

Continuing you said:

> "But it is contended in the second place that, while there may have been no interference with the act of loading, the delay is nevertheless excused by virtue of the last clause of the charter party, whereby the performance of all the charterers' covenants' *including the covenant 'to furnish and provide a cargo'* is excused if prevented by 'political occurrences,' etc., and that, if the charterers are excused from furnishing a cargo, they are likewise excused for delay in loading, since the cargo must be furnished before it can be loaded. It is sufficient to say in answer to this argument that no political occurrence is shown in this case which would serve to release the charterers from the performance of any of their covenants. *The substance and effect of the covenant to provide and furnish a cargo* was that the charterers would deliver a cargo within reach of the ship's tackle, for the purpose of loading. They did not covenant to purchase or acquire a cargo. With the *procurement* of the cargo, the *shipowner had no concern.* The *charterers* were to

provide a cargo, and the *owner* was to *provide* a *ship. In such a case the charterer may be presumed to have his cargo under control.* If a political occurrence should prevent him *from delivering* a cargo or *moving* a cargo, the excuse contemplated in the charter party would exist; but when the intervention of the political occurrence is carried further back, and is made to apply to the procurement of a cargo in the market, the *contingency is too remote* to have been contemplated by the parties, unless the language of the charter party so expresses by *clear and unmistakable terms.*"

It is true that the case of *Gardiner v. Macfarlane,* 20 Rettie, 414, does hold that an obligation to provide a cargo is not a charter obligation, but the court in that case also said this:

"But assuming that the *providing* of the *cargo* is an obligation *within* the *charter party* and *one to which the exception clause applied,* have the defenders brought themselves within the benefit of the exception? I think not. The charter party was entered into in March, 1888, at Glasgow, and (from the clause authorizing the charterers to cancel it 'if vessel do not arrive at Sydney on or before 30th September, 1888'), *it may be inferred that the 'Lismore' was expected to be at Sydney at latest before the end of September.* The charterers appear to have informed their agents at Sydney without any loss of time that the charter party had been entered into, for on 8th May the agents wrote to the colliery instructing them to book the 'Lismore' for a cargo of coals. But having thus ordered the coals for the 'Lismore,' as well as for two other vessels which were named. the agents seem to have thought that they had

done all that could be required of them. And in ordinary circumstances, perhaps, no more would have been necessary to enable them duly to fulfil their obligation to load the 'Lismore.' They *took no precautions, however,* to secure that they would get coals for the 'Lismore' in due time, and took the risk of anything occurring which would prevent this. It is the chance so risked that has occurred.

"* * * In the second place, the fact (if it be a fact, which in this particular case is more than doubtful) that the charterer could not procure the commodity in the market (it not being there for sale), which he had bound himself to put on board the chartered vessel when that vessel was ready to receive it, is *no excuse* on the ground of 'hindrance over which he had no control,' for the non-performance of his obligation, *any more than would be the excuse that having become bankrupt he had no money to purchase the commodity, it being procurable in the market.*"

In *Ardan S. S. Co. v. Weir* (1905) A. C. 501 the language of the charter party was that the 'Lismore' was to proceed to Sydney, N. S. W., "and there receive from the factors or agents of the said charterer a full and complete cargo of coals * * * *which the said merchants bind themselves to ship.*" We think it will be readily agreed that there is no difference between the obligation imposed on the charterer in the *Ardan Case* and the obligation imposed on the charterer in the case at bar.

See also:

Grant v. Coverdale, Todd & Co., 9 A. C. 470, 5 Asp. 353,
The India, 49 Fed. 76, 82,
Sorenson v. Keyser, 52 Fed. 163.

OUTPUT OF MILLS ON PUGET SOUND NOT AFFECTED BY STRIKE AFTER FIRST WEEK OF SEPTEMBER

We have hitherto assumed in this brief that there was a general strike in the Puget Sound district from July until the completion of the loading of the schooner, but in fact there was no such strike.

The trial court found that "the strike did not materially interfere with the output of the mills on Puget Sound after the *first week in September.*" (445.)

This statement is abundantly justified by the testimony. In fact the record shows that some of the largest mills in the Puget Sound district were cutting and shipping a large amount of export lumber even during the month of August. For instance, the Puget Mill Company, during the first two weeks in August, cut 3,500,000 feet and shipped, of *export* lumber, 2,260,000 feet. During the last two weeks of August the same mill cut 4,000,000 feet. During the month of September it

cut 7,500,000 feet and shipped, of *export* lumber 5,122,000 feet. In the month of October it cut 8,400,000 feet. (Libelant's 13.)

Again, take the Bloedel-Donovan Mill at Bellingham. During the month of October it cut 3,620,000 feet and shipped 2,859,000 feet of *export* lumber. In September it cut 11,537,200 feet and shipped 2,417,452 feet of *export* lumber and 190 car loads of lumber. In October the same mill cut 11,000,000 feet and shipped 3,526,000 feet of *export* lumber. (Libelant's 13.)

The greater part of the testimony in the record, other than documentary, relates to the two mills in the city of Tacoma. With reference to these two mills, at least, we think much might be said upon the proposition that there was not a strike at the mill of either company.

A strike is "a combined effort by workmen to obtain higher wages or other concessions from their employers by stopping work at a preconcerted time."

> *Bouvier's Law Dictionary, Rawle's 3rd Ed.* Vol. 3, p. 3159.

See also:

> *Longshore Printing & Pub. Co. v. Howell,* 38 Pac. 547, 551.

Iron Molders' Union v. Allis-Chalmers Co., 166 Fed. 45, 52.
Farmers Loan & Trust Co. v. Northern Pacific R. Co., 60 Fed. 803, 919.

A strike, therefore, involves a labor dispute between a body of workmen, employed by the same employer, and that employer. It does not embrace the quitting of work by employees through fear of violence or abuse by persons not connected either with employer or employee.

Halsbury's Law of England, Sec. 216.
Stephens v. Harris & Co., 6 Asp. M. L. C. 192.
Mudie v. Strick, 25 T. L. R. 453, 14 Com. Cas. 135.
Richardson v. Samuel (1898) 1 Q. B. 261.
Scrutton on Charter Parties, Art. 84.

Now, Mr. Doud, of the Defiance Mill of Tacoma testified that the employees of that mill did not make any demand upon the Mill Company. They simply walked out because they were afraid that they would be abused by men not connected with the Defiance Mill. (432.)

Mr. Griggs, the President of the St. Paul & Tacoma Lumber Company, testified as follows:

"We had a good loyal crew of men, but they were afraid to work." (282.)

But conceding there was a strike both at the Defiance Mill and at the St. Paul & Tacoma Lum-

ber Company's Mill, yet there was not a general tie-up of the lumber business even in the City of Tacoma.

Mr. Morrison testified that the Danaher Mill was closed down for the period of three days; that the mill then resumed operation and, so far as he could see, operated thereafter to full capacity. (388.) The confidential report made by the Danaher Lumber Company shows that Mr. Morrison's statement is correct. The normal cut of the Danaher Lumber Company's mill was 750,000 feet per week. That report shows that during the four weeks of the month of August, the Danaher Mill cut respectively, 646,000, 733,000, *761,000,* 702,000 feet; during the weeks ending September 1st, 8th, 15th, 22nd and 29th the mill cut respectively 770,000, 730,000, 720,000, 553,000, 637,000 feet; during October the actual cut of the mill for the weeks ending October 6th, 13th, 20th and 27th was respectively 703,000, 676,000, 608,000, 695,000 feet. (Libelant's 13.) We think it a reasonable inference from this testimony alone, and other testimony can be found in the record, that Hind, Rolph & Company might have procured a cargo for the Ostrander long before it was procured. The only reason why it was not secured was that prices for lumber had advanced. Mr. Virgin, of the Canal Lumber Com-

pany, testified that prices were advancing throughout the months of July, August, September and October. (350.)

Moreover, in the letter of August 20th, 1917, written in response to Mr. Ostrander's offer to cancel the charter party, Hind, Rolph & Company said:

> "We hardly think, however, that the buyers will agree to any cancellation, because since the cargo was sold *prices have somewhat advanced* and the purchase will no doubt turn out *very satisfactorily from their standpoint.*" (Libelant's 1-I.)

Counsel for appellants, however, says that even though the trial court may have found that the strike was over by the first week in September, yet nevertheless this court may conclude that the strike materially interferred with the output of the Port Angeles mill. (Appellants' Brief p. 30.) We think the evidence clearly disproves this assertion. Mr. Scott of Port Angeles admits that the mill could have cut more lumber for this cargo, but says that if it had the mill would have lost money. (238.) He admits also that if the logs had been sorted they could have cut 100,000 feet a day. (241.) As a matter of fact, the mill did cut in the three-day period from the morning of October 15th to the morning of October 18th, 200,000 feet, or an average of 66,600 feet per day. During the next eleven

working days in the month of October, however, it cut on an average only 24,700 feet a day.

Nor is there any reason apparent from the record why the lumber necessary to load the Ostrander could not have been cut in the month of September. From the confidential weekly report made by the Port Angeles mill to the Lumbermen's Association it appears that during the week ending September 22nd the following report was made:

> "Saw mill, box plant, planer and shingle mill all running full capacity—ten hours."

A like statement is made on the report for the weeks ending October 6th and 13th, respectively. (Libelant's 11.)

Furthermore, we think the record shows that a part of this order should have been cut at the Crown Lumber Company's mill at Mukilteo. The charter party provided for the delivery of the cargo at *one* loading place on Puget Sound. On the same day the charter party was executed, Hind, Rolph & Company entered into the contract with the Douglas Fir Exploitation and Export Company. That contract gave the Douglas Fir Company the right to deliver the cargo at *two* loading places on Puget Sound. Having made a contract with the Douglas Fir Company differing in this regard from the contract with Mr. Ostrander, Hind,

Rolph & Company secured Mr. Ostrander's consent to load at two places, namely, at Mukilteo and Port Angeles. Now, Mr. Scott admits that the Crown mill started up on the same day the Port Angeles mill did. He also admitted that its *"efficiency increased a great deal more rapidly than that of the Port Angeles mill."* (229.) The reason he gave for not sending the "Ostrander" to the Crown Lumber Company at Mukilteo was that the Crown Lumber Company's committments were full. (230.) He admitted that the schooner "Crescent," owned by *The Charles Nelson Company,* loaded a cargo of 1,441,000 feet of export lumber at the Mukilteo mill either in October or November. He also admitted that the schooner "Mukilteo" loaded at the Crown mill and the Port Angeles mill in October a cargo of 750,000 feet. This schooner was also owned by The Charles Nelson Co. (213, 214.) It cannot be argued that the Crown Lumber Company was unable to furnish this cargo because it was short of logs, as the testimony of Mr. Scott shows that at the time the strike was called the mill at Mukilteo had about 4,000,000 to 5,000,000 feet of logs on hand. (241.) We think we have demonstrated heretofore in this brief that the failure to supply the cargo at Port Angeles was not due to the insufficient supply of logs.

THE ALLEGED COMMANDEERING OF THE MILL

But little we think need be said concerning this defense—apparently even appellants did not consider it of much importance for no such defense was *pleaded.* Moreover it is not claimed that the mill was actually commandeered before Nov. 16th, but only *practically* commandeered (whatever that may mean.) Even if the mill was practically commandeered, which we deny, it is impossible to tell just when the action was taken. Mr. Scott says that the Government took such action on *September 7th.* (218) On September 15th, however, Mr. Scott told Mr. Ostrander that in all *probability* his plant *would be commandeered.* Irrespective of the question whether any such action was taken by the Government, or when it was taken, nevertheless there is no credible testimony in the record which shows that such action affected the furnishing of the cargo to the schooner. The report which we demanded from the Mill (Libelant's ——) shows that no lumber was cut for Government requirements from September 29th to November 17th. The report does not cover the period from September 7th to September 29th, but there is no reason to believe that the mill was cutting lumber for the Government during that period.

Again, if the Port Angeles mill was commandeered by the Government, such action did not take place until November 16th. We say this because on that date the Mill Company wrote the following letter to the Master of the Ostrander:

> "This is to inform you that our plant has been commandeered by the Government for the cutting of Spruce for airplane stock, and therefore, we are relieved from any and all damages for delay in loading your vessel.
>
> We will try and load your vessel as fast as we possibly can without interfering with the cutting of airplane stock for the Government.
>
> Yours respectfully,
> PUGET SOUND MILLS & TIMBER COMPANY,
> By A. A. Scott,
> Vice Pres. & General Manager."
> (Libelant's 16.)

Assuming the truth of the statement contained in such letter, nevertheless the commandeering of the Mill Company's plant did not greatly affect the ability of the mill to cut the cargo for the Ostrander. On November 17th, the day following the writing of the above quoted letter, the Mill delivered to the Ostrander 119,000 feet of lumber, the greatest amount ever delivered to the vessel at any one time.

In the face of these facts there can be no doubt but that the Court was justified in finding that the commandeering of the mill by the Government did not lessen the output of the mill on general orders or contract. (445)

THE SCHOONER WAS DETAINED 45 DAYS AFTER OCTOBER 14TH

On page 8 of Appellants' Brief it is argued that in any event the Court's award was too great. It is first said that October 15th and December 14th, 1917, should be excluded, and *Merritt v. Ona,* 44 Fed. 369, is cited in support of this statement. But the decision in that case is based upon the *peculiar* language of the lay day clause of the charter party. Except for such a provision no reason can even be suggested for excluding the day loading is completed.

As far as the first day is concerned it will be remembered that in this case notice was given by the Master on October *14th* (see page 4 of this brief). Now notice given on Sunday starts the running of lay days. (*Carroll v. Holway,* 158 Fed. 328, 336). The number of running days, therefore, is sixty-one. The Court allowed fourteen days, excluding Sundays, for loading. The schooner consequently should have been loaded by the evening

of October 30th. There were two Sundays between October 15th and October 30th, so that a total of sixteen days should be subtracted from the whole number of running days. This subtraction the Court made, and allowed forty-five days.

Counsel for appellants argues that *all* the Sundays should be excluded. The basis for this contention is certainly not apparent. The charter party provides for the payment of demurrage *"for each and every day's detention"* of the schooner. "Each and every day" includes Sunday.

> *The Oluf,* 19 Fed. 459;
> Halsbury's Laws of England, Vol. 26, p. 122.
> Carver on Carriage by Sea, Sec. 613;
> *Pedersen v. Eugster,* 14 Fed. 422.

On this point it may be argued that the decree itself excludes Sunday. The phrase "but not including Sundays" found in the decree modifies the preceding phrase "less fourteen loading days." (447). This is not only the correct grammatical construction, but the opinion of Judge Neterer demonstrates that it is also his construction of the decree, as the cases which we have just cited, holding that the phrase "each and every day" includes Sundays, are cited and approved by him in his opinion.

In a desperate attempt to find some method by which the award can be pared down, it is insisted that *Saturday afternoons* should be excluded. The record, of course, is destitute of any showing that Saturday afternoons are holidays in the Puget Sound Lumber District. More than that, even if they were half holidays the cases just cited demonstrate that they should not be excluded. But above and beyond all this the same contention was made in the lower court, and it was there shown that between October 18th, when loading actually commenced, and November 24th there were six Saturday afternoons. The first Saturday was October 20th. The stevedores on that day worked from seven to five (57); on October 27th the stevedores worked all day (58); on November 3rd they worked from one P. M. to three P. M. They did not work longer that day because *the wharf was cleaned up* (61); on November 10th the stevedores worked from seven to noon, at which time *the wharf was cleaned up* (63); on November 17th they worked from 7:30 to 4:30 P. M. (65); on November 24th they worked from 7:30 to two P. M. (67).

FROM NOVEMBER 24TH TO DECEMBER 15TH.

The boat was completely loaded on November 24th, but the bills of lading were not signed or the

freight money paid until December 14th. We think we can best explain the cause of this delay by setting out the facts in chronological order. One of the causes of this delay arose from certain directions given by Charles Nelson Company to the Mill Company *over a month before* the boat was completely loaded. On *October 22nd* the Nelson Company wrote the Mill Company as follows:

> "Please note in connection with order No. 633, D. F. E. & E. Co. for shipment per Motor Schr. 'Levi W. Ostrander,' shipping instructions, etc. attached. You will also find pro forma Bills Lading and specifications for this cargo and under separate cover we are sending you a supply of their blank Bills Lading, *specifications* and *demurrage releases,* which you will please make use of in connection with this shipment.
>
> "You will note from the pro forma Bills Lading that the *freight must be prepaid,* therefore you will please arrive at a definite understanding with the Master of this vessel before she completes loading, in regard to this matter so there will be no unnecessary delay.
>
> "According to the charter party, the freight is payable at S. F., consequently the *prepaid* Bills Lading must be forwarded to us here before payment can be made. If the Captain is not prepared to furnish you with prepaid Bills Lading, the buyers to remit the freight to his owners upon receipt of same. We would suggest you have him draw on Hind, Rolph & Co. at three days' sight draft to come through the Anglo & London Paris Bank of S. F. with original Bills Lading attached, but no time must be lost in so doing.

> "We are quite sure that you fully understand the details necessary for this transaction and would request you to give them your usual prompt attention." (Respondents' A-12.)

It will be noted from the foregoing letter that cargo specifications were sent to the Mill Company to be used when the boat was laden. However, the Mill Company failed, until November 28th. to make up these specifications. (101)

On that date, the Mill Company exhibited to the Captain a copy of the cargo specifications and a copy of the bill of lading. It also demanded at the same time that the Captain sign a demurrage release (101). Upon being so advised Mr. Ostrander wired his Captain to secure a copy of the cargo specifications and of the bill of lading, and also asked to be advised as to manner in which the freight money was to be paid. (Libelant's 6-A.) The Captain replied that he would endeavor to secure copies of the cargo specifications and the bill of lading, and that the freight was payable to him or on a sight draft on the London Paris Bank, San Francisco, to Ostrander's order, with prepaid bills of lading attached. (Libelant's 6-H.)

It will be observed that the bills of lading which it was insisted the Captain should sign were bills of lading showing the payment of freight. The Mill

Company refusing to recede from its position, Mr. Ostrander brought the matter to a head by libeling the cargo on November 30th. Recovery was sought not only for the demurrage which had accrued prior to November 25th and for a period of five days thereafter, but also "for each day's detention from and after this date," i. e., November 30th.

Bond was furnished by Hind, Rolph & Company on December 3rd. (2.) Mr. Hodges, a representative of Hind, Rolph & Company, arrived in Seattle on December 4th. (382.) On December 5th, Mr. Hodges and Mr. Ostrander arrived at the following agreement:

(1) The Master was to sign bills of lading in the form originally prepared by the Douglas Fir Exploitation & Export Company, but containing in addition the following endorsement:

> "This bill of lading is issued and accepted subject to all the terms and conditions set forth in a charter party of May 15, 1917, between H. F. Ostrander, owner, and Hind, Rolph & Company, Charterers." (Libelant's 6-C.)

(2) That the freight was to be paid by demand draft on Hind, Rolph & Company, but same was not to be presented for collection until December 10th. (Libelant's 5-B.)

The Captain was detained in Seattle by illness on December 6th. (103.) He returned to Port Angeles, however, on the 7th and informed the Mill Company that he was ready to sign a bill of lading in the form agreed upon between Mr. Hodges and Mr. Ostrander. (Libelant's 6-D.) Between the 5th and the 7th, however, some demand had apparently been made that a demurrage release be signed, and Mr. Ostrander agreed that the Captain should sign a demurrage release in favor of the Mill Company in the following terms:

> "Security for my claim for demurrage to date of loading having been given by my charterers, I now have no claim against cargo for demurrage." (Libelant's 6-E.)

Request was also apparently made of Mr. Ostrander that the bills of lading be dated December *3rd.* He agreed to comply with this request. He accordingly advised his Captain to give the demurrage release to the Mill Company and to change the date of the bills of lading. (Libelant's 6-E.) He also advised Mr. Hodges that he had given the foregoing instructions to his Captain. (Libelant's 6-K.) Mr. Hodges was then in Aberdeen, Washington. Upon receipt of the foregoing advice from Mr. Ostrander he wired as follows:

> "Telegram just received and satisfactory. However, in view present delay signing will you please telegraph your Frisco bank extending draft until Thursday, which will be much appreciated. Kindly answer." (Libelant's 6-J.)

Reply to this telegram was apparently not promptly received by Mr. Hodges. (Libelant's 5-I.) This, of course, was not the fault of Mr. Ostrander. Mr. Hodges, however, sent on December 9th the following telegram:

> "In view no reply to my telegram of yesterday I am tonight wiring my principals to decline payment of draft. This draft was given on sole understanding that ladings were to be signed last Thursday. You have instructed your captain to sign but stipulated conditions that were not questioned before so delay in documents reaching San Francisco was due to your action and also in violation of our understanding I cannot now consistently agree to payment of draft until ladings actually arrive in San Francisco. I regret this very much but events had made this action necessary. Should you wish to communicate with me my address is Multnomah Hotel." (Libelant's 6-L.)

It will be noted that Mr. Hodges gives as his reason for declining to pay the draft that Mr. Ostrander was not willing to carry out the exact agreement which had been made. The evidence demonstrates that this assertion was wholly untrue. On December 10th, Mr. Ostrander wired Hind, Rolph & Company as follows:

"Hodges wires me from Portland that he has requested you to decline payment of draft he gave me for freight on Ostrander. I insist that draft be paid immediately when presented and unless you agree to this I will instruct Master further not to sign ladings until freight money is in my hands. I am thoroughly tired of the methods you are employing in this transaction." (Libelant's 5-C.)

On the same day he received the following reply:

"We will pay the freight money Levi W. Ostrander the moment we receive from you proper bill of lading also letter certifying that you have now no claim against cargo for demurrage. Will hold you responsible for loss of time and all consequence damages resorting from your actions." (Libelant's 5-D.)

In reply to the preceding telegram Mr. Ostrander sent the following:

"Yours of date as bill lading as presented for signature carries on its face receipt for the freight I do not see how you can expect delivery of bills lading until you have paid freight STOP On bank's advice of payment of freight draft bills of lading and letter covering claim for demurrage all as per form approved by your Mr. Hodges will be at once delivered by Master to Mill Company at Port Angeles." (Libelant's 5-E.)

On the 11th, Hind, Rolph & Company wired as follows:

"Your wire tenth. You misunderstand our position. *We do not expect bill ladings* before

> payment freight. *Payment freight* and *deliver bill ladings concurrent acts* to be done simultaneously deposit bill ladings and letter in form approved by Hodges in Port Angeles bank in escrow to be delivered Hodges on such bank receiving telegraphic advice from San Francisco bank that freight money has been received to your account here ship as per charter party clauses G. Hodges arrives Port Angeles tomorrow to attend details." (Libelant's 5-F.)

On December 13th, Mr. Hodges, who was then in Portland, sent the following telegram to Mr. Ostrander:

> "Please have Captain sign ladings and letter that we agreed upon and deposit them with the Port Angeles Trust Savings Bank with instructions to mail them to me by special delivery at Multnomah Hotel as soon as they receive telegraphic advice that the freight money has been deposited in your name at San Francisco. I am asking bank to telegraph when documents are in their hands and I will then arrange deposit in San Francisco." (Libelant's 6-M.)

On the 14th, Mr. Ostrander himself went to Port Angeles. When he arrived there, however, (383) the Mill Company refused to carry out the agreement which had been made (382-383), even though that agreement embraced the giving of a letter by the Captain to the Mill Company that no claim for demurrage was being made against the Mill Company. Mr. Ostrander thereupon wired Hind, Rolph & Company as follows:

> "On Hodges' assurance that mill was ready to carry out his arrangements with me I came here to have bill ladings placed in escrow with understanding you would pay freight today. Mill declines to proceed pending specific instructions from Chas. Nelson. Please see they instruct Scott immediately. Want to leave here at one today." (Libelant's 5-H.)

Hind, Rolph & Company thereupon communicated with Charles Nelson Company and then sent the following telegram:

> "Charles Nelson Company telegraphing mill act under instructions from Hodges." (Libelant's 5-G.)

Charles Nelson Company apparently wired the Mill Company and it finally agreed to carry out the agreement made between Mr. Ostrander and Mr. Hodges, but even then protested against changing the date on the bills of lading from November 27th to December 3rd. (Libelant's 6-G.)

Now, we think no one can read this record without being convinced that the delay after the loading down to December 14th was not in any respect due to any fault of Mr. Ostrander. The fault was primarily that of the Mill Company, the agents of Hind, Rolph & Company. In truth, the record demonstrates that Hind, Rolph & Company themselves recognized that such was the fact. Mr. Hodges of Hind, Rolph & Company on December

20th, wrote a letter to Mr. Ostrander, in which, among other things, he said:

> "We *admit* that in some instances the loading mill may have taken what seemed to be *undue* precautions which have *hindered the prompt dispatch of the vessel,* but if you will consider the *sole* actions of this firm, think that you can but agree that everything possible was done to expedite the sailing of the vessel. There was probably one or two days' unfortunate delay which was due to a misunderstanding of one important telegram which the writer should have received on Monday afternoon, December 10th, but was not received until Wednesday, the 12th. This may or may not have had any effect on the final settlement, but it is certainly the only event whereby we could have been held responsible for any seeming neglect." (Libelant's 5-I.)

Mr. Ostrander in reply said this:

> "Your letter of the 20th to hand this morning. I dislike very much to further discourse an unpleasant transaction, but your action in stopping payment of the draft given me for freight money—notwithstanding that the Captain was at all times ready after his return to Port Angeles on the 7th inst. (he having been delayed here one day) to sign ladings on the basis of Mr. Hodges' agreement with me, *and in the same terms which he ultimately signed,* certainly did not reassure me of your good intentions.
>
> "Further—there has been from the first so apparent an attempt on your part to *blame others* with whom I am in no way concerned for your short-comings that I believe on due

> reflection you will admit that I had very good reasons for expressing myself as I did and that I certainly have no reason to feel differently now." (Libelant's 5-J.)

In their reply to Mr. Ostrander's letter Hind, Rolph & Company did not claim that Mr. Ostrander was in any respect at fault. They accounted for a portion of the delay by reason of the fact that Mr. Hodges, who was most familiar with the transaction, was away from San Francisco at the time, and that in his absence Hind, Rolph & Company saw nothing else to do but to stop payment on the draft. (Libelant's 5-K.)

CARGO SPECIFICATIONS.

Irrespective of all other considerations, the delay between November 24th and November 28th was due to the failure of the Mill Company to furnish specifications of the cargo. It is said, however, (Appellants' Brief, p. 45) that the vessel could have sailed away without the cargo specifications being delivered to her, and that consequently this was not a cause of the vessel's detention. This statement, however, is manifestly erroneous. In order for the vessel to sail she must clear at the Customs House, and before the vessel can clear she must furnish to the Customs House a manifest of her

cargo. The manifest must contain a description of the cargo. It must show the number of pieces on board. (R. S., §§4197-4198.) This information the Captain does not have. It must be supplied to him by the shipper.

In accordance with the provision of the statute above cited the Treasury Department has made the following regulation, which was in force and effect in November, 1917:

> "Vessels bound to foreign countries or to or from noncontiguous territory of the United States should not accept shipments unless extracts in the form hereinbefore provided, certified by the Collector of Customs, or declarations and extracts therefor have been received.
>
> "The customhouse number on the certified extract *must be noted on the vessel's manifest* opposite each consignment, and such extracts attached to and delivered with such manifests to the Collector for clearance.
>
> "Clearance will not be granted to any vessel until a complete manifest accompanied by certified extracts, or declarations and uncertified extracts, for all cargo on board has been filed with the Collector as required by Sections 4197 to 4200, Revised Statutes, except under the following conditions."
>
> Treasury Decisions No. 35969, Vol. 29, page 655.

BILLS OF LADING AND PREPAID FREIGHT.

It is next argued that the insistence of Hind, Rolph & Company and the Mill Company that straight bills of lading should be issued by the Captain was not a cause of the delay. It is claimed that the charter party did not require prepayment of freight, and that consequently the Captain could have issued any form of bill of lading he desired, and then sailed away. It is true that the charter party does not in express terms require the prepayment of freight, but nevertheless we think that it does in effect so require. Moreover, the understanding of all the parties to the transaction convincingly proves that prepayment of freight was required.

In the letter of October 22nd, Charles Nelson Company advises the Mill Company that the bills of lading require that the freight *must be prepaid* (Respondents' A-12) and the bills of lading sent forward to the Mill Company contained such a provision.

Again, the record shows that no one of the parties to the transaction ever claimed that freight was not to be prepaid. Moreover, the record shows that under this form of charter party it was *customary*

that the freight should be prepaid. We call the Court's attention to the following cross-examination of Mr. Ostrander by counsel for appellants:

"Q. Do you remember under the charter-party what the provision was for the payment of the freight?

A. I do not recall now.

Q. Is it not a fact that the freight was to be paid at San Francisco, under the charter-party?

A. That draft was payable at San Francisco.

Q. How is that?

A. That draft was also payable at San Francisco.

Q. You expected you would have to go down to San Francisco to collect that freight, didn't you?

A. Oh, no.

Q. You did not? A. No.

Q. What was your idea?

A. My idea was that the bills of lading would be handed over against the payment of the freight, *as is customary,* in San Francisco, according to the charter-party.

Q. Did you understand at the time that you were not entitled to any freight until you handed over the bills of lading? A. Oh, yes.

Q. You knew that? A. Yes.

Q. You knew that you were obliged—

A. —to deliver the bills of lading to get my freight." (142.)

Furthermore, Hind, Rolph & Company, as late as December 11th, wired Mr. Ostrander as follows:

> "Your wire 10th. You misunderstand our position. *We do not expect* bill ladings before payment freight. Payment freight and deliver bill ladings concurrent acts to be done simultaneously. Deposit bill ladings and letter in form approved by Hodges in Port Angeles bank in escrow to be delivered Hodges on such bank receiving telegraph advice from San Francisco that freight money has been received to your account here ship as per charter party clauses G. * * *." (Libelant's 5-F.)

Appellants seek to meet the foregoing argument by asserting that it was the statutory duty of the Master to issue a bill of lading; that he could have issued and tendered a bill of lading in any form he desired and then sailed away. It is true that it is the duty of the Master to issue a *true* bill of lading, but the bill of lading must describe some one as the shipper, and we presume be delivered to some person. It must also give the port of discharge. To whom, we may ask, were we to issue this bill of lading? What port were we to name as the port of discharge? The charter party gives the charterer the right to name any one of five ports. Which one of these ports was the Captain to select? More than this, the right to prepayment of freight is to the shipowner, under the precise form of charter party used in the case at bar, a most valuable right. The charter party provides:

"U. Freight to be paid as per Clause G, and after payment to be considered *earned,* vessel *lost* or not lost, at any stage of the voyage."

Now, when did the assertion of a legal and valuable right become a fault? Or will it be argued that because one does not surrender or waive a valuable right that, therefore, a wrongdoer is to be relieved from the consequences of his own wrongful act?

The case of *Hansen v. American Trading Co.,* 208 Fed. 884, is not in point. It was admitted in that case that the Master had no right for one of the reasons, at least, assigned by him to refuse to sign the bill of lading presented to him. But the Master in this case was not in the wrong in part or at all. He had a right to refuse to issue any bill of lading until the freight money was paid to him. He was not compelled to look either to his lien on the cargo or to marine insurance.

WAR TRADE BOARD

It is next argued that the principal cause of the detention of the vessel at Port Angeles was the act of the War Trade Board. It is true that prior to December 14th the War Trade Board had refused to permit the schooner to depart for South Africa,

but we fail to see how this relieves the appellants from liability for demurrage until the freight money was paid.

We admit that if a charterer agrees to give a vessel dispatch and fails to do, and then by reason of such failure the vessel is detained still further by ice, blockade, embargo, or other hindrance, and the vessel but for such failure would have been able to sail before prevented by ice, blockade, embargo or other hindrance, she nevertheless can recover demurrage for only such time as she was detained by *fault* of the charterers. This we think is the clear import of the decisions in *Randall v. Sprague,* 77 Fed. 247, and *Dewar v. Mowinckel,* 179 Fed. 355, 361.

> "The charterer is not liable for a detention which occurs *without any fault* on his part after the loading has once been completed."
>
> Carver on Carriage by Sea, 6th Ed. Sec. 630.

This statement no doubt means that the charterer is liable for all delay until the time when he ceases to be *at fault.* He is not liable for any delay thereafter. The period then for which demurrage will be awarded is the period during which the charterer is at fault. When the fault ceases liability ceases, even though as a consequence of the fault the ship may be detained longer. But the charterers in this case were *at fault until December 14th.*

A CREW WAS SECURED IN PROPER TIME

It is argued that the charterers are excused from any delay between November 24th and December 14th by reason of the failure on the part of the Master to secure a crew. The Master on December 4th, after saying that he had not as yet *signed on* a crew, continued:

> "Q. Do you know when you will get away then, Captain?
>
> A. *I have the men ready to go with me as soon as we get through with his here.*
>
> Q. You have gotten a crew?
>
> A. I have gotten them already to sign on.
>
> Q. When did you get your crew?
>
> A. We got them up here.
>
> Q. I say when?
>
> A. I got them within the last day or two." (82.)

Now, there was no necessity that the Captain should secure a crew at any earlier date. The schooner was not ready to sail and Mr. Ostrander testified without contradiction that it is not the custom to obtain a crew and ship them on board before the vessel is ready to sail. (385.)

SEIZURE OF THE CARGO DID NOT DETAIN THE VESSEL

It is said that our act in seizing the cargo was the real cause of the detention of the vessel from November 24th to December 14th. Let us see. In the first place the cargo was seized on November 30th and released on December 3rd. Obviously, detention *after* December 3rd and *before* November 30th was not due to our act. But the seizure of the cargo did not detain the vessel at all. Hind, Rolph & Company at all times down to December 5th were demanding *clear* bills of lading. They also wanted a demurrage release. Mr. Ostrander had a claim for demurrage "which he had a right to demand should be settled at the place of loading." (*The India,* 49 Fed. 83.) He was willing, however, to issue or accept a bill of lading which would protect his claim. Hind, Rolph & Company also wanted *prepaid* bills of lading. True, they were willing to pay freight money, but only upon the condition originally that *clear* bills of lading were issued.

Mr. Hodges and Mr. Ostrander finally arrived at an agreement concerning this matter, but Hind, Rolph & Company repudiated the agreement and stopped payment on their draft. Mr. Hodges gave as his reason for stopping payment the delay in

delivery of a telegram. Hind, Rolph & Company gave as their reason the absence of Mr. Hodges from San Francisco, and their inability, in his absence, to determine what they should do. Moreover, Mr. Hodges agreed to a demurrage release in one form—the Mill Company demanded another form. Hind, Rolph & Company requested that the bills of lading be dated December 3rd. Mr. Ostrander acquiesced in their request, but the Mill Company *protested* against that date being inserted in the document. Now, what was the real cause of the detention of the vessel? Originally it was the insistence by Hind, Rolph & Company and the Mill Company, their agents, upon conditions which they had no right to exact. In the second place it was the repudiation by Hind, Rolph & Company of the agreement which they had made. In the third place it was due to the action of the Mill Company in refusing to carry out the second agreement made between Hind, Rolph & Company and Mr. Ostrander.

It may be that under the decision in the case of *Elvers v. W. R. Grace & Company,* 244 Fed. 705, Mr. Ostrander did not have a lien on the cargo for demurrage at the port of loading, but in this connection it is to be observed that while the *Elvers Case* was decided prior to November, 1917, yet the deci-

sion had not at that time been rendered available to the profession. Moreover, if there be any legal proposition in maritime law involved in obscurity, it certainly is a proper construction of the cesser clause. The cases have hitherto been in hopeless and irreconcilable conflict. Mr. Scrutton points out that Lord Bramwell has piquantly described this class of cases as "cases where no principle of law is involved but only the meaning of careless and slovenly documents." (Scrutton on Charter Parties, 9th Ed. Art. 54.)

We think it perfectly clear, therefore, that Mr. Ostrander acted as any reasonable man would have acted under the circumstances, and that the seizure of the cargo constituted no fault on his part.

THE PERIOD FROM NOVEMBER 30TH TO DECEMBER 14TH

It is asserted by appellants that no demurrage can be recovered for the period between November 30th and December 14th, for two reasons: First, because counsel for appellee waived any claim for demurrage for this period in open court, and second, that no demand for demurrage for this period was made in the libel, nor was the libel amended to ask for demurrage for this period.

With reference to the last contention, the record shows that the libel was filed on November 30th. Five days demurrage had already accrued. Demand was made for demurrage for this five-day period, *and* also for demurrage in the sum of $250.00 per day for each and every day's detention from and after November 30th. (8.) On what theory, therefore, it can be said that the libel contained no claim for demurrage from November 30th to December 14th we are at an utter loss to understand.

The contention that we waived demurrage for any period after November 30th is equally unfounded. This we think we can abundantly demonstrate. At the time of the trial Mr. Ostrander was the first witness called. He was asked a few questions concerning his occupation, the ownership of the schooner, when he acquired her, whether the vessel was ready to receive her cargo on August 25th, what he observed when he was at Port Angeles in October relative to the method in which lumber was furnished to the vessel, and then his attention was directed to the events which occurred after the loading of the vessel was completed. He stated that he entered into a certain agreement, hereinbefore set out, with Mr. Hodges. As Mr. Hodges did not arrive in Seattle until December 4th (382) it is obvious that Mr. Ostrander was testifying as

to events which occurred subsequent to November 30th. The details of the arrangement between Mr. Hodges and himself were then given. (101, 103.)

Mr. Ostrander next stated a conversation which he had with Mr. Scott of the Port Angeles mill on December 14th. Thereupon there was introduced in evidence all the correspondence relative to this period. The great bulk of the letters and telegrams so introduced were written and sent between December *5th* and December *14th* (105, 106). Nearly all these letters and telegrams were introduced as one exhibit, and counsel for appellee accompanied their introduction with this statement:

> "I will say for your information that all these letters and telegrams in this exhibit relate to the controversy which arose as to what should be endorsed upon these bills of lading and the subsequent controversy which grew out of it relative to the stopping of the payment upon the draft which was given to Mr. Ostrander." (106.)

The statement just quoted was then followed by the following statement from counsel for appellants:

> "Mr. Hengstler—If your Honor please, it is admitted by us that all these communications are authentic, but I wish to reserve my exception to the materiality and relevancy of this testimony and any testimony which pertains to the period of November 24th, reserving the point that I will be able to satisfy your Honor *that as a matter of law, no demurrage could*

arise. Now, may that objection apply to anything else that is offered after *November 24th?"* (107.)

Immediately after the making of the foregoing statements there was offered on behalf of appellee some additional letters and telegrams, all of which were written and sent between November 28th and December 14th, and all of which related to appellee's claim for demurrage for the period running to December 14th. (108, 109.)

Upon the conclusion of the direct examination of Mr. Ostrander and before the remark which is relied upon by appellants as a waiver (146) was made by counsel for appellee, counsel for appellants cross-examined Mr. Ostrander. This cross-examination was directed in part to what happened after Mr. Hodges came to Seattle in December. (Record, pp. 141, 142, 143.) Upon the conclusion of this cross-examination counsel for appellee, in order to show that the delay between December 14th and December *26th* was not due to any default of Mr. Ostrander, but was due solely to the act of the War Trade Board, stated that he would offer in evidence certain letters and telegrams which would show that such was the fact. (145.) While it is true that the five-day period was mentioned, yet the purpose of making the statement was also set forth as follows:

> "We are making no claim for the subsequent time during which the Government would not allow us to proceed." (146.)

It is thus clearly apparent that counsel for appellants was not misled, and that he was not prevented from cross-examining as to this period, but that he did in fact cross-examine as to the facts concerning the period between November 30th and December 14th. It will not be denied that Mr. Ostrander was available for cross-examination at all times, nor will it be questioned that the precise contention made here was made in the lower court and urged with vigor. The trial court was in a position to know whether or not the inadvertent allusion to the five-day period had misled counsel for appellants or prevented him from bringing out any fact which he might desire to bring out concerning this particular period.

The trial court, however, allowed us demurrage from November 24th to December 14th, and we submit that in so doing he was clearly in the right.

Respectfully submitted,

CHADWICK, MCMICKEN, RAMSEY & RUPP,
Proctors for Appellee and Cross-Appellant.

No. 3426

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IN ADMIRALTY

HIND, ROLPH & COMPANY, a Copartnership, and 1,727,783 Feet of Lumber Loaded on Board the Schooner "Levi W. Ostrander," and Fidelity Deposit Company of Maryland, a Corporation,

Appellants and Cross-Appellees,

vs.

H. F. OSTRANDER,

Appellee and Cross-Appellant.

Upon Appeal From the United States District Court for the Western District of Washington, Northern Division.

ANSWERING BRIEF OF H. F. OSTRANDER, APPELLEE AND CROSS-APPELLANT

CHADWICK, McMICKEN, RAMSEY & RUPP,
Proctors for Appellee and Cross-Appellant.

660 Colman Building,
Seattle, Washington.

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